Petition

81-1792

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1981

OSCAR B. McINNIS, *Petitioner,*

vs.

THE DISTRICT GRIEVANCE COMMITTEE FOR THE DISTRICT 12-B OF THE STATE BAR OF TEXAS, ACTING IN THE NAME OF THE STATE OF TEXAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS SITTING AT BEAUMONT

JOHN E. LEWIS
(Counsel of Record)
JONES, LEWIS & PETTITT
P. O. Drawer 2285
McAllen, Texas 78501
(512) 687-8203
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

The Respondent brought to trial a disbarment suit against Petitioner, the Criminal District Attorney of Hidalgo County, Texas, at a time when he was under a federal felony indictment for perjury based upon the same fact situation. The questions thereby arising are:

I. Whether the Court of Appeals erred in ruling that the trial court did not err in overruling Petitioner's motion for a continuance at a time when he was under indictment for perjury based on the same fact situation as the civil case.

II. Whether the Court of Appeals erred in holding that it was permissible for Respondent to call Petitioner as an adverse witness, over his protest, thereby forcing him to invoke his privilege against self-incrimination in the presence of the jury.

III. Whether the taped conversations which had been excluded in a state criminal prosecution based on the same fact situation on the grounds that they had been obtained through entrapment could thereafter be used by another arm of the state (The State Bar of Texas) for use in this disbarment proceeding.

IV. Whether the State statutory defense of entrapment was available to Petitioner.

V. Whether the Court of Appeals erred in holding that the conduct of law enforcement agents was not so outrageous as to bar the admission of such tapes in evidence, based on the conclusion that this is a civil proceeding.

VI. Whether the standard of proof in this disbarment case is by "a preponderance of the evidence" or the "clear and convincing" standard.

TABLE OF CONTENTS

Questions Presented 1
Opinions Below 1
Jurisdiction 2
Constitutional Provisions and Statutes Involved 2
Statement of the Case 4
Reasons for Granting Writ 9
Conclusion 16
Certificate of Service 16
Appendix "A" A1
Appendix "B" A4
Appendix "C" A21
Appendix "D" A22
Appendix "E" A22
Appendix "F" A23
Appendix "G" A24
Appendix "H" A34
Appendix "I" A42
Appendix "J" A48
Appendix "K" A49
Appendix "L" A52
Appendix "M" A54

TABLE OF AUTHORITIES

CASES

Addington v. Texas, 99 S.Ct. 1804 15
Armstrong v. Manzo, 85 S.Ct. 1187 11
Board of Regents of State Colleges v. Roth, 92 S.Ct. 2701 11
Boddie v. Connecticut, 91 S.Ct. 780 11
Boyd v. United States, 6 S.Ct. 524 ..... 9, 14
Dennis v. Consolidated Rural High School District, 577 F.2d 338 11
Elkins v. United States, 80 S.Ct. 1437 13
Erdmann v. Stevens, 458 F.2d 1205 ..... 9, 14
Fox River Paper Co. v. Railroad Commission, 47 S.Ct. 669 10
Goldsmith v. United States Board of Tax Appeals, 46 S.Ct. 215 11
Grannis v. Ordean, 34 S.Ct. 779 11
Greene v. United States, 454 F.2d 793 15
In Re Ruffalo, 88 S.Ct. 1222 9
Hampton v. United States, 96 S.Ct. 1646 15
Kaprelian v. Texas Woman's University, 509 F.2d 133 11
Lees v. United States, 14 S.Ct. 163 12
Mallory v. Hogan, 84 S.Ct. 1489 12
Norman v. State, 588 S.W.2d 340 14
One 1958 Plymouth Sedan v. Commonwealth of Pa., 85 S.Ct. 1246 ..... 9, 14
One 1963 Chevrolet Pickup Truck v. Commonwealth of Va., 158 S.E.2d 755 14
Perry v. Sindermann, 92 S.Ct. 2694 10
Rangel v. State, 585 S.W.2d 695 14

Sherman v. United States, 78 S.Ct. 819 15
Simmons v. United States, 88 S.Ct. 967 10
Spevack v. Klein, 87 S.Ct. 625 12
United States v. McInnis, 601 F.2d 1319 5
United States v. Prairie, 572 F.2d 1316 15
United States v. Russell, 93 S.Ct. 1637 14
United States v. Twiggs, 588 F.2d 373 15
United States v. U. S. Currency, 626 F.2d 11 10
Wehling v. Columbia Broadcasting System, 608 F.2d 1084 10
Wolfe v. State of North Carolina, 80 S.Ct. 1482 10

UNITED STATES CONSTITUTION

Amendment IV 13
Amendment V 2, 6, 12
Amendment XIV, Section 1 ..... 2, 12

UNITED STATES STATUTES

28 U.S.C. Section 1257(3) 2

TEXAS CONSTITUTION

Article 5, Section 6, Paragraph 3 3

TEXAS CIVIL STATUTES

Article 332d, Section 10(c) 3, 4, 11
Article 332b-4, Sections 1, 2, and 5 ..... 3, 12

TEXAS PENAL CODE

Section 8.06 ..... 3, 14

No.

In the Supreme Court of the United States

October Term, 1981

OSCAR B. McINNIS, *Petitioner,*

vs.

THE DISTRICT GRIEVANCE COMMITTEE FOR THE DISTRICT 12-B OF THE STATE BAR OF TEXAS, ACTING IN THE NAME OF THE STATE OF TEXAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS SITTING AT BEAUMONT

Petitioner, Oscar B. McInnis, prays that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Ninth Supreme Judicial District of Texas, sitting at Beaumont, entered in the above cause on May 21, 1981. Application for Writ of Error to the Supreme Court of Texas was denied on December 16, 1981, and Motion for Rehearing denied on January 13, 1982.

OPINIONS BELOW

The judgment of the trial court is appended hereto. (Appendix "A", p. A1). The opinion of the Court of Appeals for the Ninth Supreme Judicial District of Texas is reported in 618 S.W.2d 389. (Appendix "B", p. A4). The denial of the Application for Writ of Error to the Supreme

Court of Texas is as yet unreported and appears as Appendix "C", p. A21 and denial of the Motion for Rehearing by the Supreme Court of Texas is as yet unreported and appears as Appendix "D", p. A22. A copy of the granting of the Motion To Stay Enforcement of Judgment is appended hereto as Appendix "E", p. A22.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Supreme Judicial District of Texas, of which a review is sought, was entered on May 21, 1981, rehearing denied June 25, 1981. The judgment of the Supreme Court of Texas denying the Application for Writ of Error was entered on December 16, 1981. A timely Motion for Rehearing was denied on January 13, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

United States Constitution, Amendment XIV, Sec. 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Texas Constitution, Article 5, Section 6, paragraph 3, as amended eff. September 1, 1981.:

"All constitutional and statutory references to the Courts of Civil Appeals shall be construed to mean the Courts of Appeals."

Texas Revised Civil Statutes, Article 332d, Section 10(c):

"A prosecuting attorney is disqualified from performing the duties and functions or exercising the privileges of his office when a petition for removal has been filed against him as provided in this Act."

Texas Revised Civil Statutes, Article 332b-4 (as applicable):

"Section 1. This Act shall be known as the Professional Prosecutors Act . . .

"Section 2. In this Act, 'district attorney' means . . . the criminal district attorney in each of the counties of . . . Hidalgo, . . .

"Section 5. (a) A district attorney governed by this Act may not engage in the private practice of law, . . ." (Effective August 27, 1979)

Texas Penal Code, Section 8.06 - Entrapment:

"(a) It is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording a person the opportunity to commit an offense does not constitute entrapment.

"(b) In this section 'law enforcement agent' includes personnel of the state and local law enforcement agen-

cies as well as of the United States and any person acting in accordance with instructions from such agents."

STATEMENT OF THE CASE

This is a suit in disbarment brought by Respondent against Petitioner. On October 19, 1979, judgment was rendered against Petitioner. (Appendix "A", p. A1). He has exhausted his state remedies. (Appendices "B", p. A4, "C", p. A21, "D", p. A22).

At all relevant times, Petitioner was the Criminal District Attorney of Hidalgo County, Texas (S.F. 234 and 1485). (Appendix "F", p. A23). On September 1, 1978, the Texas Prosecutors Coordinating Council filed a suit (based on the same facts as those alleged in this disbarment complaint) against him to remove him from office. (Appendix "K", p. A49). This suit is still pending. The filing of this suit had the legal effect of disqualifying Petitioner from exercising the duties of his office. (Article 332d, Section 10(c), R.C.S., *supra*). Petitioner was re-elected to office in the November, 1978 general election; but because of the pendency of the removal suit and later the disbarment judgment which placed him in a suspended category, he has never since assumed the duties of the office.

On June 7, 1978, an indictment was returned against Petitioner in the United States District Court for the Southern District of Texas charging conspiracy to kidnap. Later, a superseding indictment was returned adding several counts of perjury allegedly committed before a federal grand jury. The counts alleging false statements to a federal grand jury in Respondent's complaint for disbar-

ment were based on the same facts as those of the perjury counts in the indictment.

After a pre-trial hearing on September 8, 1978, in the United States District Court, the federal indictment was dismissed by the presiding judge. The government appealed. On September 10, 1979, the Fifth Circuit Court of Appeals affirmed the dismissal of the conspiracy to kidnap count but reversed and remanded the perjury counts. (See *United States v. McInnis*, 601 F.2d 1319).

This disbarment suit commenced in the 206th District Court of Hidalgo County, Texas, on September 17, 1979, seven days after the decision of the Fifth Circuit. Shortly after the aforementioned decision, Petitioner filed a Motion for Continuance requesting that the disbarment suit be postponed until the perjury charges were tried (Appendix "G", p. A24), which was denied by the Court. (Appendix "J", p. A48). He then filed a Motion for Severance (Appendix "H", p. A34), which was overruled by the Court. (Appendix "J", p. A48).

On September 17, 1979, during the course of the trial, Petitioner filed a Motion in Limine (Tr. 182, Appendix "I", p. A42) requesting that Respondent's counsel be instructed not to call or attempt to call Petitioner as a witness and compel him to claim his constitutional privilege against self-incrimination in the presence of the jury. Thereafter, Respondent's counsel stated in the presence of the jury that they desired "to call Oscar McInnis as an adverse party." (S.F. 1427), to which Petitioner objected. (S.F. 1429). Objection was overruled. Petitioner was required by the Court to take the stand as a witness in the presence of the jury.

After stating his name, address and occupation, the Petitioner refused to answer any further questions, claim-

ing his privilege against self-incrimination under the Fifth Amendment to the United States Constitution because of the pending of the federal indictment. Respondent's counsel then proceeded to ask Petitioner some twenty separate questions of a prejudicial nature in the presence of the jury, to which Petitioner claimed the privilege. (S.F. 1432-1437).

Thereafter, Respondent's counsel in closing argument to the jury referred repeatedly to the fact that Petitioner had taken the Fifth Amendment, had refused to testify, and that inferences should be drawn for such refusal. See for example:

> *S.F. 2938-39*: "Oscar McInnis hasn't testified in this case because he don't want to testify. He testified once too often and that was before the grand jury in Brownsville where he made a false statement. And I am sure that he regrets it to this day. He's not going to make that mistake again in this case.
>
> "And you can infer from the very fact that he refused to tell you what happened, he of all persons would know best of all—you could infer that he didn't tell you because he's guilty."
>
> *S.F. 2943*. "Oh, the lawyers were highly offended by Mr. Zunker asking the question, 'When did you become lovers?' Now Oscar McInnis could have denied under oath at that point, 'We never became lovers.' But he chose to remain silent, pleading the Fifth Amendment."
>
> *S.F. 2949*: "But Oscar suddenly doesn't want to talk. You have a right to infer from his silence that if he answered it, he would have been convicted."

Daniel Rodriguez, a witness for Respondent, had been returned to the Hidalgo County jail from Leavenworth Federal Institution to answer a murder indictment. (S.F. 363). At the time, he was serving an eight year sentence in the federal institution on a narcotic violation. (S.F. 360). After disposition of his murder indictment, Rodriguez did not desire to be returned to the federal institution because of his fear of an inmate there on whom he had informed. (S.F. 364, 433-34). The Sheriff kept Rodriguez in the county jail for several months in keeping with the prisoner's desires, during which time Rodriguez became an informer for the Sheriff. Rodriguez was accorded many privileges not enjoyed by other prisoners. (S.F. 675-76, 468-70, 545, 549, 613, 1537, 2039, 2070, 2132, 2276, 2281, 2315).

Rodriguez approached another prisoner soliciting aid in getting Petitioner removed from office. He represented that the Sheriff wanted Petitioner removed so that he could be replaced with a friend of the parties, Jon Wood. (S.F. 2076-84). This prisoner refused to participate. Some unpleasant incidents had transpired between the Sheriff and Petitioner in his capacity as district attorney. (S.F. 639-52).

Rodriguez made three tape recordings between himself and Petitioner on a recorder furnished by the Sheriff after Rodriguez had suggested that the only way to get rid of Villanueva was to have him killed. (S.F. 382). Thereafter, the Sheriff, Rodriguez and Jon Wood contacted the United States Attorney in Houston and solicited his aid in building a case against Petitioner. The Federal Bureau of Investigation then entered the case, and more recordings were made under its directions.

Approximately one week before the case was presented to the federal grand jury, the Sheriff, Jon Wood

and one Joe Lamantia contacted the Governor at Austin, Texas, toward getting Wood appointed district attorney if Petitioner was removed. (S.F. 683-84, 1412, 2061-63). The Governor advised the parties that there was no vacancy. (Certified copies of the S.F. to be furnished.)

On January 5, 1979, Judge Vernon D. Harville, presiding in the 206th District Court of Hidalgo County, Texas, on a criminal prosecution for solicitation of murder against Petitioner arising out of the same factual situation, suppressed the tape recordings and transcriptions thereof on the grounds that they had been obtained through entrapment. (Exhibit Volume Two, pp. 533-34, Appendix "L", p. A52). The tape recordings were then delivered to Respondent, another agency of the state, and used against Petitioner in the disbarment trial. Petitioner objected.

During the course of the disbarment trial, the trial court accepted as a fact that the tapes had been obtained as a result of entrapment. (S.F. 1612, quoted below).

> "THE COURT: Well now, just stop, Mr. Grant. You know and I know from a legal viewpoint, the tapes in fact were obtained illegally and are suppressed. There is no way—"

The Court allowed the evidence on the premise that it had not been shown that the Respondent had participated in the entrapment. (S.F. 1600 et seq., 2368, 2380, 2757 - certified copies of S.F. to be furnished). Petitioner requested that Special Issues on entrapment be submitted to the jury. This was denied by the Court. (Appendix "M", p. A54).

The standard of proof submitted to the jury in this case was "preponderance of the evidence", rather than the "clear and convincing standard." Petitioner contended on appeal that this was fundamental error. (Appendix "B", p. A18).

REASONS FOR GRANTING WRIT

The Court of Appeals for the Ninth Supreme Judicial District of Texas has decided federal questions in a way in conflict with applicable decisions of this Court and in conflict with those of federal courts of appeals. The Supreme Court of Texas refused an Application for Writ of Error, thereby approving the decisions of the lower court.

Virtually every direct holding contained in the opinion of the court below refers to or depends in some degree upon the Court's stated conclusion that,

> "It is well settled that disbarment proceedings are civil in nature and governed by Rules of Civil Procedure." (Appendix "B", p. A6).

This is in direct conflict with the decision of this Court in *In Re Ruffalo*, 88 S.Ct. 1222, that such proceeding is quasi-criminal in nature.

In *Erdmann v. Stevens*, 458 F.2d 1205, 1209, U.S. cert. den. (2d Cir. 1972), with reference to a proceeding to discipline an attorney, the Court said:

> ". . . in our view a court's disciplinary proceeding against a member of the bar is comparable to a criminal rather than a civil proceeding."

See also *One 1958 Plymouth Sedan v. Commonwealth of Pa.*, 85 S.Ct. 1246 (1965), and *Boyd v. United States*, 6 S.Ct. 524.

The Court of Appeals, which wrote the final opinion, did not address itself in many instances to the federal Constitutional issues involved. However, "a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward non-federal grounds of decisions which are without any fair or

substantial support. *Wolfe v. State of North Carolina*, 80 S.Ct. 1482 (1960); *Fox River Paper Co. v. Railroad Commission*, 47 S.Ct. 669 (1927).

I. Petitioner had moved for a continuance on the grounds that he could not defend without incriminating himself in the pending federal criminal case. The Court of Appeals disposed of this issue on the basis that, "This disbarment proceeding is a separate and distinct matter and completely independent of any other proceedings which were pending." (Appendix "B", p. A8). This ruling fails to recognize the federal Constitutional questions involved.

When Petitioner was put to trial at a time when federal criminal charges were pending against him based on the same fact situation, he had to make an election between his Constitutional right against self-incrimination and his right to due process, i.e., a meaningful trial in which he could defend himself in a meaningful manner. This Court has disapproved of procedures which require a party to surrender one Constitutional right in order to assert another. *Simmons v. United States*, 88 S.Ct. 967 (1968). See also *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (1979). Further, loss of Petitioner's license to practice law meant the automatic loss of his elected office, a property interest. *Perry v. Sindermann*, 92 S.Ct. 2694 at 2699 (1972).

In *United States v. U. S. Currency*, 626 F.2d 11 (Sixth Cir. 1980), a forfeiture proceeding dismissed by the district court wherein the defendant had the burden of filing an answer under oath and pursuing his claim, the Court said:

> "Clearly, appellees should not be compelled to choose between the exercise of their Fifth Amendment privilege and the substantial sums of money which are the subject of this forfeiture proceeding . . ."

> "The Court might also choose to stay the forfeiture proceedings until the completion of any criminal prosecutions, or until the relevant statutes of limitation for the federal and state criminal offenses have expired . . ."

In *Kaprelian v. Texas Woman's University*, 509 F.2d 133 (5th Cir. 1975), the court said:

> "A state employee, . . . having a liberty or property interest in his position must be accorded procedural due process . . ."

See also *Board of Regents of State Colleges v. Roth*, 92 S.Ct. 2701 (1972); *Goldsmith v. United States Board of Tax Appeals*, 46 S.Ct. 215 (1926), and *Dennis v. Consolidated Rural High School District*, 577 F.2d 338 (5th Cir. 1978).

> ". . . due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 91 S.Ct. 780 (1971).

A fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean*, 34 S.Ct. 779, 783. "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 85 S.Ct. 1187 (1965).

There was no "countervailing state interest of overriding significance" requiring that Petitioner's motion for continuance be denied. At the time, he was disqualified from exercising the duties of his office by the filing of the removal suit under Article 332d, R.C.P., *supra*, and unable to practice law because of the Professional Prosecutors

Act, Article 332b-4, *supra*. The Court of Appeals failed to recognize the federal questions involved. Its disposition of the issue on the grounds stated does not comport with due process under the 5th and 14th Amendments as interpreted by this Court and federal Courts of Appeals.

II. In disposing of Petitioner's complaint that he should not have been called as a witness over his protest and forced to claim his privilege in the presence of the jury, the Court of Appeals said:

> "Since this is a civil action, it is entirely proper for the State to call appellant as a witness." (Appendix "B", p. A6).

This holding is in conflict with decisions of this Court, failed to take into consideration the Constitutional issues involved, and resulted in the rendition of an improper judgment.

In *Lees v. United States*, 14 S.Ct. 163, 165 (1893) an action to recover a forfeiture for illegal importation of aliens, this Court said:

> "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than refer to the case of *Boyd v. U.S.*, 116 U.S. 616, 6 Sup. Ct. 524 . . ."

In *Mallory v. Hogan*, 84 S.Ct. 1489 (1964), this Court laid down the rule that a person has a right to "remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."

In *Spevack v. Klein*, 87 S.Ct. 625, 628 (1967), this Court said:

> "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in Griffin v. State of California, . . . 85 S.Ct. 129, . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'."

Requiring the Petitioner to claim the privilege against self-incrimination in the presence of the jury, then commenting thereon in final argument to the jury made the assertion of the Fifth Amendment privilege "costly", within the meaning of the foregoing decision. In failing to recognize these principles, the Court of Appeals rendered a judgment in conflict with the foregoing decisions on federal questions.

III. In disposing of Petitioner's contention that the tape recordings, having been excluded in a State criminal prosecution (Appendix "L", p. A52), could not then be used by another agency of the State in this disbarment case, the Court of Appeals commented:

> "We have carefully considered all other points brought forward and overrule them as being without merit." (Appendix "B", p. A21).

In so doing, the Court did not recognize the "silver platter" doctrine as enunciated by this Court in *Elkins v. United States*, 80 S.Ct. 1437 (1960), that evidence obtained by state officers in violation of defendant's immunity from unreasonable searches under the Fourth Amendment is inadmissible over objection in a federal criminal case.

The same principles are applicable here. Evidence held inadmissible against Petitioner in a criminal prosecution should not be used in a quasi-criminal disbarment proceeding brought in the name of the State by one of its agencies.

IV. In disposing of Petitioner's defense of entrapment, the Court of Appeals relied upon its stated conclusion that the proceeding was civil, and therefore, the defense was not available to Petitioner. (Appendix "B", p. A9).

Contrary to the holding of the Court of Appeals, the following federal cases hold that illegally obtained evidence may not be used in quasi-criminal proceedings:

> *One 1958 Plymouth Sedan v. Pennsylvania,* 85 S.Ct. 1246 (1965); *Boyd v. United States,* 6 S.Ct. 524; *One 1963 Chevrolet Pickup Truck v. Commonwealth of Va.,* 158 S.E.2d 755 (1968 - Sup. Ct. of Va.), and *Erdmann v. Stevens,* 458 F.2d 1205 (1972, 2d Cir.).

Since the enactment of Sec. 8.06, Texas Penal Code, effective January 1, 1974, the "objective test" is the law on entrapment in Texas. *Rangel v. State,* 585 S.W.2d 695 (1979) and *Norman v. State,* 588 S.W.2d 340 (1979), both cases by the Tex. Ct. of Crim. Apps.

See *United States v. Russell,* 93 S.Ct. 1637, 1647, dissenting opinion by Justice Stewart on focus of the objective approach.

V. As to Petitioner's allegation concerning "outrageous conduct of law enforcement agents", the Court of Appeals stated:

> "Appellant's authorities barring prosecution for a criminal offense are not applicable to this civil proceeding." (Appendix "B", p. A9).

The facts in this case establish that Daniel Rodriguez, the person doing the taping of Petitioner, was at all relevant times a law enforcement agent, as that term is defined in Sec. 8.06, Texas Penal Code, that he originated

the alleged criminal plot for the purpose of inducing the Petitioner to violate the law and the acts alleged for purposes of disbarment were the "creative activity" of law enforcement agents.

The Court of Appeals' decision in this category is in conflict with those of the federal courts in the following cases:

Sherman v. United States, 78 S.Ct. 819, 821 (1958); *Greene v. United States*, 454 F.2d 793 (9th Cir. 1971); *United States v. Twiggs*, 588 F.2d 373 (3rd Cir. 1978); *Hampton v. United States*, 96 S.Ct. 1646.

In *United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978) the Court stated:

> "Despite the lack of a majority opinion, we have read the *Hampton* opinion as permitting a due process defense based on the outrageous nature of the government's conduct."

VI. The Court of Appeals stated that, "The proper standard of proof of all issues in this disbarment proceeding is by a preponderance of the evidence." (Appendix "B", p. A18). This holding is in conflict with the reasoning of this Court in *Addington v. Texas*, 99 S.Ct. 1804 (1979), as applied to Petitioner's disbarment case, wherein the Court says:

> "One typical use of the standard (clear and convincing) is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk of the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." (At p. 847).

After the decision of the Court of Appeals, each of the foregoing Points of Error was raised by Petitioner in The Supreme Court of Texas by an Application for Writ of Error, which was refused. (Appendix "C", p. A21). (Certified copies of Application to be furnished by Clerk of the Court of Appeals.)

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

JOHN E. LEWIS
(Counsel of Record)
JONES, LEWIS & PETTITT
P. O. Drawer 2285
McAllen, Texas 78501
(512) 687-8203
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, John E. Lewis, a member of the Bar of the Supreme Court of the United States, do hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been served on Respondent by depositing same in a United States Post Office with First Class postage prepaid, addressed to Jerry Zunker, Office of the General Counsel, State Bar of Texas, P. O. Box 12487, Capitol Station, Austin, Texas 78711, counsel of record for Respondent, on this the 23rd day of March, 1982.

JOHN E. LEWIS

Appendix

APPENDIX

APPENDIX "A"

No. C-2178-78-D

IN THE DISTRICT COURT OF
HIDALGO COUNTY, TEXAS
206th JUDICIAL DISTRICT

STATE OF TEXAS

V.

OSCAR B. McINNIS

JUDGMENT

ON THE 17th day of September, 1979, the above-entitled and numbered cause was called for trial. The Plaintiff appeared by and through its authorized representatives and attorneys and the Defendant appeared in person and by and through his attorneys of record. The parties announced ready for trial, and a jury having been demanded, a jury was thereafter selected and duly sworn and said cause proceeded to trial.

On the 12th day of October, 1979, the jury, through its foreman, Melvin Brady, announced in open court that a verdict had been reached. Such verdict, having been signed by the following jurors: Guadalupe Tellez, Jose G. Vela, Alicia De Alejandro, Leticia Echazarreto, Ruth N. Barber, Billie Williams, Robert L. Glenn, Francisco Moreno, Honore Flores, Miguel Velasquez, Melvin Brady; was returned into open court. The court then polled the jury and each of the jurors who signed the verdict acknowl-

edged in open court that the verdict was his or hers. Whereupon, the Court received the jury's verdict, which verdict is incorporated herein by reference and made a part hereof for all purposes. In response to the special issues submitted by the Court, the jury's verdict was as follows:

Question No. 1:	"Yes" (11-1)
Question No. 2:	"Yes" (12)
Question No. 3:	"Yes" (12)
Question No. 4:	"Yes" (12)
Question No. 5:	"Yes" (12)

Upon request from the Defendant, the Court recessed the trial until 9:30 a.m. on October 18, 1979, to permit the Defendant to offer evidence relevant and material to the issue of discipline. On October 18, 1979, the parties appeared in open court and the Defendant proceeded to offer evidence on the issue of discipline. Both Plaintiff and Defendant presented arguments to the Court bearing on the measure of appropriate discipline.

The Court, based upon the evidence, the jury's verdict, the argument of counsel and the law applicable thereto, is of the opinion and so finds that the Defendant, Oscar B. McInnis is guilty as to Questions No. 1, 2, 3, 4 and 5, as found by the jury, of engaging in illegal conduct involving moral turpitude, of engaging in conduct that is prejudicial to the administration of justice and of engaging in conduct that adversely reflects on his fitness to practice law. In addition the Court finds that the Defendant is guilty, as to Questions Nos. 2, 3, 4 and 5, as found by the jury, of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. All of which acts and conduct violate a Disciplinary Rule and all of which acts and conduct amount to professional misconduct. Any one of which

acts and conduct would justify and warrant the disbarment of the Defendant from the further practice of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, Oscar B. McInnis, be disbarred as an attorney at law and that he shall hereafter exercise none of the privileges and prerogatives of the office of an attorney at law. Such judgment of disbarment is based upon the jury's verdict to any one of the following questions (Special Issues): 1, 2, 3, 4, and 5.

It is further ORDERED by this Court that the Defendant, Oscar B. McInnis, immediately surrender to the District Clerk his license to practice law and his permanent State Bar card and that the District Clerk transmit such license and card, together with a certified copy of Plaintiff's First Amended Formal Complaint together with the trial amendment thereof, and a certified copy of this Judgment to the clerk of the Supreme Court of the State of Texas. The District Clerk is further ordered to transmit to the Executive Director of the State Bar of Texas a certified copy of Plaintiff's First Amended Formal Complaint, together with the trial amendment thereof and a certified copy of this Judgment.

It is the further ORDER, JUDGMENT and DECREE of this Court that all costs of Court be taxed against the Defendant, Oscar B. McInnis.

It is the further ORDER of this Court that any and all necessary legal processes shall issue for the enforcement of this Judgment.

RENDERED, SIGNED and ENTERED this 19th day of October, 1979.

/s/ Joe B. Evins
Judge Presiding

APPENDIX "B"

Oscar B. McINNIS, Appellant,

v.

The STATE of Texas, Appellee.
No. 8548.

Court of Civil Appeals of Texas,
Beaumont.

May 21, 1981.
Rehearing Denied June 25, 1981.

Jack Skaggs, Harlingen, John Lewis, McAllen, for appellant.

Davis Grant, Jerry Zunker, State of Texas, Austin, for appellee.

CLAYTON, Justice.

This is a disbarment action. The State of Texas, acting through the Grievance Committee for District 12-B of the State Bar of Texas, instituted this disbarment suit against Oscar B. McInnis. Based upon jury findings, the trial court entered a judgment disbarring McInnis from the practice of law, from which judgment this appeal has been perfected.

The record before us is voluminous. The statement of facts is in twenty-one volumes consisting of 3,300 pages. It would serve no useful purpose to detail the evidence presented in this proceeding. The State's contentions are that all the actions complained of were committed by McInnis while serving as Criminal District Attorney for Hidalgo County, and in such capacity, as well as in the capacity as private attorney for Patricia Parada Villanueva,

and that all such actions were committed by McInnis in attempts to regain physical custody of Patricia's minor child. As a result of the actions of McInnis, the jury, in response to special issues, found the following:

1. McInnis, upon certain dates in 1978, solicited and attempted to induce Daniel J. Rodriquez to cause the death of Noe Villanueva.

2. McInnis, on June 7, 1978, made a false statement before a Federal Grand Jury when he denied to the Grand Jury that he had discussed the murder of Villanueva with Rodriquez.

3. McInnis, on June 7, 1978, made a false statement before a Federal Grand Jury when he denied to the Grand Jury that he had discussed "Cantu" with Rodriquez.

4. McInnis, on June 7, 1978, made a false statement before a Federal Grand Jury when he denied to the Grand Jury that he had discussed the identification papers of Villanueva with Rodriquez and had received identification papers of Villanueva from Rodriquez.

5. McInnis, on June 7, 1978, made a false statement before a Federal Grand Jury when he denied to the Grand Jury discussing the possibility of obtaining a "hit man" for Villanueva, and when he denied that such discussion was the subject of his conversation with Rodriquez.

Based upon the above findings of the jury and the evidence presented, the trial court found that McInnis "was guilty of engaging in illegal conduct involving moral turpitude, of engaging in conduct that is prejudicial to the administration of justice and of engaging in conduct that adversely

reflects on his fitness to practice law." The court further found McInnis guilty of "engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation" and entered a judgment of disbarment.

Appellant's first and fourth points complain of errors in permitting the State to call him as an adverse party witness causing him to invoke his Fifth Amendment* privilege against self-incrimination in the presence of the jury. The thrust of his argument is that this proceeding is quasi-criminal in nature, and, as such, he is entitled to the protection afforded him by the Fifth Amendment; namely, that a defendant in a criminal case shall not be compelled to give evidence against himself. He argues that to permit the State to call him as a witness and to force him to invoke the privilege against self-incrimination in the presence of the jury creates such prejudice in the eyes of the jury as to constitute an effective denial of his right to invoke such privilege. At the time of this trial, there was a Federal indictment for perjury pending against him.

[1-3] It is well settled that disbarment proceedings are civil in nature and governed by rules of civil procedure. *Drake v. State,* 488 S.W.2d 534 (Tex.Civ.App.—Dallas 1972, writ ref'd n. r. e.); *Arnett v. State,* 304 S.W.2d 386 (Tex.Civ.App.—Eastland 1957, writ ref'd n. r. e.); *Meyer v. Tunks,* 360 S.W.2d 518 (Tex.1962); *Ex parte Butler,* 522 S.W.2d 196 (Tex.1975); *Polk v. State Bar of Texas,* 480 F.2d 998, 1002 (5th Cir. 1973). Since this is a civil action, it is entirely proper for the State to call appellant as a witness. *Ex parte Butler,* supra; *Meyer v. Tunks,* supra. See *United States v. White,* 589 F.2d 1283 (5th Cir. 1979). Upon becoming a witness, however,

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*U.S. Constitution.

appellant retains his right and privilege against self-incrimination. *Ex parte Butler,* supra; *Maness v. Meyers,* 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975). Appellant did invoke his privilege and was permitted to do so by the trial court after being called as a witness. These points are overruled.

Appellant's second point complains of error in overruling his motion for continuance. His argument is that, because of the pendency of a criminal case against him involving some of the same accusations (i.e., perjury, as is made in this proceeding), he was entitled to a continuance of this disbarment proceeding until a final disposition of the criminal case. It is appellant's contention that: "The criminal case now . . . pending against this defendant in Federal Court, should take precedence over this case, which is a civil case only."

The granting or denial of a motion for continuance is within the sound discretion of the trial court, and the trial court's decision will not be reversed except for a clear abuse of discretion. *Hernandez v. Heldenfels,* 374 S.W.2d 196 (Tex.1963); *Arnett v. State,* supra.

[4-6] The record before us does not show when this disbarment case was filed, but it does show the case had been on file for many months. The record does not show how long the criminal case had been pending. Appellant's motion was filed three days prior to the day this disbarment case was called to trial. Even though an indictment might be pending against an attorney, a suit for his disbarment, on the same grounds and for the same offense, may be brought and prosecuted to judgment. *Fulmer v. State,* 445 S.W.2d 546 (Tex.Civ.App.—Fort Worth 1969, writ ref'd n. r. e.); *Meyer v. Tunks,* supra; *Arnett v. State,* supra. If the disbarment trial was continued until all criminal charges against this attorney were resolved, this

disbarment suit may well be delayed for several months or years. In light of the fact that the purpose of disbarment proceedings is to protect the public, not to punish the attorney, a long and indefinite delay in the disbarment proceeding would be an unreasonable approach to the judicial process in seeking or obtaining the protection of the public. We find no constitutional or statutory provisions granting this appellant the right to choose the case, either criminal or civil, which he desires to first proceed to trial. This disbarment proceeding is a separate and distinct matter and completely independent of any other proceedings which were pending. See *In the Matter of Bates*, 555 S.W.2d 420, 478 (Tex.1977). There is no showing by appellant that the trial court abused its discretion in overruling the motion for continuance. This point is overruled.

Appellant's fifth point complains of the admission in evidence of the "alleged Grand Jury testimony of the Defendant" and the alleged tape recordings between the defendant and the witness Daniel Rodriquez because the conduct of law enforcement agents in obtaining this evidence is so outrageous that due process principles bar the plaintiff from invoking judicial processes to obtain a disbarment of the defendant by the use of such evidence. Even though this point is multifarious, we will consider the same. *O'Neil v. Mack Trucks, Inc.*, 542 S.W.2d 112 (Tex.1976).

[7] Appellant relies upon the language used in *United States v. Russell*, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973), that "involvement of government agents in a crime might bar prosecution if the methods used violate a 'fundamental fairness, shocking to the universal sense of justice' . . . ." This defense is founded on due process and is reserved for the extreme case where

the government's activity is "outrageous" or "grossly shocking." This disbarment proceeding is a civil proceeding and is not a criminal prosecution. It is not even necessary for the State to prove a criminal offense. The question before the trial court was whether such acts constituted professional misconduct, not whether all the elements of a criminal offense were present. *Smith v. State,* 523 S.W.2d 1, 5 (Tex.Civ.App.—Corpus Christi 1975, writ ref'd n. r. e.).

[8] Appellant's authorities barring prosecution for a criminal offense are not applicable to this civil proceeding. Moreover, upon a review of the record before us, we do not find that any actions of the "governmental agents" are so outrageous as to render the evidence complained of inadmissible in this proceeding based upon such grounds of complaint. This point is overruled.

[9] Appellant next complains of admitting the tape recordings of conversations between defendant and Rodriquez because the recordings were illegally obtained in violation of *Tex.Penal Code* § *8.06* (1974). We do not agree. Again, appellant reiterates his argument that this proceeding is a quasi-criminal proceeding and that he is afforded the protection of the *Section 8.06* of the Penal Code, which provides a defense, in a criminal prosecution of entrapment. This proceeding is not a criminal prosecution, and, therefore, such *Section 8.06* is not applicable. This disbarment proceeding is a civil action. The plaintiff in this proceeding has no authority to prosecute appellant in a criminal case. The defense of entrapment is not available to this appellant in this disbarment proceeding. *Dotson v. Texas State Board of Medical Examiners,* 607 S.W.2d 36 (Tex.Civ.App.—Fort Worth 1980), rev'd on other grounds, reported in the Supreme Court Journal Vol. 24, at 274. This point is overruled.

Appellant, in his seventh, eighth, and ninth points of error, complains of the introduction into evidence of a copy of the transcript of his testimony before the Federal Grand Jury for the reasons: (1) the State had not obtained an order of disclosu e as required by *Rule 6(e)* of the Federal Rules of Criminal Procedure; (2) the transcript from which the copy was made "had been previously introduced in a Federal Court hearing for the limited purpose of that hearing"; (3) there was no proper predicate laid for its introduction.

In attempting to prove that appellant had made false statements to a Federal Grand Jury, the State introduced, over appellant's objections, a copy of his testimony given before such grand jury. At a prior hearing in the United States District Court in Brownsville, counsel for appellant introduced a copy of the transcript of his testimony. At the time this transcript was introduced at such hearing, it became a public record filed among the papers in Cause No. B-78-33, styled *United States v. Oscar McInnis and Patricia Prada,* which is still pending in the United States District Court, Brownsville, Texas. In an appeal by the government in this Federal case to the Court of Appeals, Fifth Circuit, in New Orleans, Louisiana, a copy of the transcript, which was offered by appellant, was attached to the government's brief and was then, as now, a matter of public record. The appellant himself made this transcript of his testimony before the grand jury a matter of public record prior to the time of its admission in evidence in the case at bar.

[10] Appellant argues that this transcript was not admissible in this disbarment proceeding because it was introduced by appellant in the criminal proceeding for the limited purpose for that hearing only. Assuming, arguendo, the validity of such argument, with which we do

not agree, we have found nothing in the record before us showing that such a limited offer was made. Such a limited offer has been challenged by appellee in its brief. Appellant has not pointed out in his brief where such offer for a limited purpose can be found in the record. The burden is on appellant that the record supports his contentions and to point out the place in the record where the matters complained of are shown. See *City of Manvel v. Texas Department of Health Resources*, 573 S.W.2d 825 (Tex.Civ.App.—Beaumont 1978, writ ref'd n.r.e.); *Kropp v. Prather*, 526 S.W.2d 283 (Tex.Civ.App.—Tyler 1975, writ ref'd n.r.e.). Appellant has failed to meet his burden.

[11] Since appellant himself introduced this evidence in the criminal prosecution in the United States District Court, we must presume, in the absence of proof to the contrary, that he did not do so in violation of *Rule 6(e), Federal Rules of Criminal Procedure*. The copy of the transcript introduced in the case at bar was obtained from the files of the criminal case in the United States Court of Appeals, Fifth Circuit, and such copy was properly authenticated by the Clerk of the Court of Appeals. The Federal Grand Jury court reporter properly identified the transcript and testified that she had actually recorded and reproduced it and that such reproduction was accurate and correct. The copy of the transcript was properly admitted into evidence. These points are overruled.

Appellant's tenth, eleventh, twelfth, and thirteenth points complain of error in not requiring the jury to make a finding regarding "intent in Special Issue No. 1"; that appellant "intended that D. Rodriquez cause the death of Noe Villanueva"; that there was no pleading or evidence to support Issue No. 1; that the evidence conclusively established that appellant did not attempt to induce or solicit Rodriquez to cause the death of Villanueva;

and that any such finding is against the great weight and preponderance of the evidence. We do not agree.

Special Issue No. 1 was submitted to the jury as follows:

> "Did Oscar B. McInnis, on or about April 17, 1978, and various dates subsequent thereto, up to and including May 21, 1978, solicit and attempt to induce Daniel J. Rodriquez to cause the death of Noe Villanueva?"

[12, 13] After a careful review of all the evidence, according to the standard of review expressed in *Rourke v. Garza*, 530 S.W.2d 794, 799 (Tex.1975), and *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951), we find such evidence was legally and factually sufficient to support the submission and the jury's finding on such Special Issue; and the pleadings, including appellee's trial amendment, were sufficient to support the submission of such Special Issue. A finding on "intent" was not necessary in this case. Once again appellant assumes, in his argument, that this is a criminal or quasi-criminal proceeding, and, once again, we reject such argument. As stated in *Smith v. State*, supra at 5-6:

> "The State does not have the burden of proving the criminal offense. . . . The question before the trial court was whether such acts constituted 'professional misconduct' not whether all of the elements of a criminal offense were present."

These points are overruled.

Appellant's fourteenth point complains of error in "submitting Special Issues Nos. 2, 3, 4, and 5 to the jury without requiring the jury to find that, if such false statements were made, they were made knowingly or intention-

ally, or that they were material to any issue or made with intent to mislead or deceive." Issue No. 2 inquired of the jury if appellant made a "false statement before a Federal Grand Jury when he denied to the Grand Jury that he discussed the murder of Noe Villanueva with Daniel J. Rodriquez."

[14] Appellant argues the necessity of inquiring if such act was committed "knowingly" or "intentionally" in the issue submitted to the jury. We do not agree. The authorities cited by appellant to support his argument are criminal cases concerning the essential elements of a criminal offense and the necessary allegations contained in an indictment. Again, we point out this is not a criminal prosecution, and it is not necessary for the State in this civil proceeding to prove all the elements of a criminal offense. The question before the trial court was whether such acts constituted professional misconduct, not whether all the elements of a criminal offense were present. *Smith v. State,* supra. This point is overruled.

Appellant's fifteenth point complains of error in submitting Issues Nos. 2, 3, 4, and 5 "without requiring this jury to find that the alleged false statements contained in each issue [were] actually made." We consider this point even though it is multifarious. The thrust of appellant's argument is that Issue No. 2, referred to in the preceding fourteenth point, assumes that appellant discussed "the murder of Noe Villanueva with Rodriquez," and that a separate issue should have been submitted making such inquiry. We do not agree. A careful review of the evidence shows that appellant discussed the murder of Villanueva with Rodriquez, and the transcript of the grand jury testimony clearly reveals that appellant denied having such discussions when he testified before the grand jury. Appellant offered no evidence disputing this testimony. It is

well settled that it is not necessary for the trial court to submit an issue on an undisputed fact. *Sullivan v. Barnett*, 471 S.W.2d 39, 42 (Tex.1971); *Wright v. Garnandt*, 559 S.W.2d 864 (Tex.Civ.App.—Corpus Christi 1977, no writ). The same argument is made as to Issues Nos. 3, 4, and 5, and we find the evidence as to the statements in each issue is undisputed. This point is overruled.

[15] Appellant's sixteenth point complains of error "in entering a judgment not supported by the findings of the jury." This point of error is entirely too general to be considered on appeal. It does not comply with the rules requiring that points of error direct the attention of the appellate court to the specific error relied upon. *Tex. R.Civ.P.418; McWilliams v. Muse*, 157 Tex. 109, 300 S.W.2d 643 (1957); *Pleasant Grove Builders, Inc. v. Phillips*, 355 S.W.2d 818 (Tex.Civ.App.—Dallas 1962, writ ref'd n.r.e.); *Salazar v. Valdez*, 587 S.W.2d 519 (Tex.Civ.App.—Corpus Christi 1979, no writ); *Cortez v. Corsi*, 513 S.W.2d 648 (Tex.Civ.App.—Corpus Christi, 1974, writ ref'd n.r.e.).

Appellant's seventeenth point complains or error "in not submitting to the jury requested issues and explanatory instructions on entrapment." We again reiterate, as was stated in a prior point of error, that the defense of entrapment is not available to appellant in this disbarment proceeding, and such issues and instructions relating to such defense were properly refused.

[16, 17] Appellant's eighteenth and nineteenth points complain of error in overruling his motion for instructed verdict on grounds of no evidence and insufficient evidence. In deciding a no evidence point, we must determine whether there is any evidence of probative force to raise fact issues on the material questions presented. We must consider all the evidence in the light most favorable to appellee, in this instance, discarding all contrary evidence and infer-

ences. *Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex.1978). After a careful review of all the evidence, and applying the proper standard of review, we find there is legally sufficient evidence of probative force to support the findings of the jury. This no evidence point is overruled. We also overrule the "insufficient evidence point" for the reason that an "insufficiency" point cannot be the basis for an instructed verdict. The rule is well settled that "where an issue or verdict has some support in the evidence, although the great weight and preponderance of the evidence may be the other way," then the trial court cannot direct a verdict or grant a judgment notwithstanding the verdict. *Gulf, Colorado & Santa Fe Railway Company v. Deen*, 158 Tex. 466, 312 S.W.2d 933, 937, cert. denied, 358 U.S. 874, 79 S.Ct. 111, 3 L.Ed.2d 105 (1958).

Appellant's twentieth point complains of the admission in evidence of the "tapes of the alleged conversations between Rodriquez and appellant because of the lack of a proper predicate."

The tape recordings introduced in evidence were made by Rodriquez while he was an inmate of the Hidalgo County jail. They were recordings of conversations between Rodriquez and appellant. Three of the taped recordings were made on a cassette recorder provided by the Sheriff. Six tapes were made on a recording device provided by agents of the F.B.I. The Sheriff kept the first three tapes in his possession at all times until they were placed in the custody of the F.B.I. agent. Rodriquez heard these three tapes; he recognized the conversations and testified there was no difference between the conversations on the tapes and his recollection of such conversations. He also identified the voices on the tapes as being his and appellant's. The Sheriff testified that up until the time he released custody of the tapes to the F.B.I., there had been no changes, addi-

tions, or deletions made to the tapes. He further identified the voices as those of Rodriquez and appellant.

At the time these three tapes were turned over to the F.B.I., an Assistant U.S. District Attorney listened to the tapes, made copies of them, and testified there was no difference between the tapes introduced into evidence and the ones he had heard when they were turned over to the F.B.I., and that they were the same tapes. He also identified the voices as those of Rodriquez and appellant.

The witness Graham, an agent of the F.B.I., furnished the recording instrument for making the tapes identified as Exhibits 18a through 23a. The machine was a cassette recorder. He had heard the tapes many times before he actually turned them over for safekeeping in the "F.B.I. Office." He testified he detected no difference in the tapes as introduced and the ones he had heard on many occasions while they were actually in his custody. He testified there were no changes, deletions, or additions to them between the times he had heard them played.

[18] The equipment used in taping the conversations was identified, explained, and demonstrated for the benefit of the court and jury. The speakers whose voices were on the tapes were identified as those of Rodriquez and appellant. It was shown there had been no changes, alterations, or deletions on the tapes from the time they were recorded until they were introduced in evidence. The authenticity of the tapes was clearly established. The trial court properly admitted the tapes in evidence. See *In the Matter of Bates,* supra; *Edwards v. State,* 551 S.W. 2d 731 (Tex.Cr.App. 1977); *Drake v. State,* supra.

[19] Appellant next complains, in his twenty-first point, of error in limiting the testimony of appellant's witnesses for impeachment purposes only. In his point of

error, he specifically names eight witnesses. We find nothing in this record showing a "blanket" ruling of the court limiting the testimony of each witness. Appellant does not complain of any specific questions or answers propounded or given. He does not make any reference to the testimony so limited and does not comply with the requirements of *Tex.R.Civ.P. 418(e)*. In not complying with such rule, we cannot determine the evidence about which complaint is made. No attempt has been made to show how any ruling of the trial court has been prejudicial to appellant. No authorities are cited in support of this point. Where there has been no compliance with *Rule 418(e)*, we have no duty to make an independent search of the voluminous record before us to ascertain if the point has merit. *Saldana v. Garcia*, 155 Tex. 242, 285 S.W. 2d 197, 200 (1955). Appellant, by such omissions, has waived this point of error. *Frazier v. Wynn*, 492 S.W.2d 54, 61 (Tex.Civ.App.—Amarillo 1973, writ ref'd n.r.e.).

[20] Appellant next complains of "denial of due process under the Fourteenth Amendment of the U.S. Constitution because he was not afforded the opportunity to defend himself before the local Grievance Committee." We do not agree. Appellant answers this complaint in his first sentence of his argument under this point. He states, "[T]he defendant was called before the Grievance Committee at a time when he had a pending indictment" against him. The record, cited by appellant, shows he appeared with counsel before the Grievance Committee. He states in his brief, "The testimony of this witness further established that [appellant] exercised his constitutional privilege and answered no questions 'other than a few of a preliminary nature.'" This clearly shows appellant was present at the meeting of the Grievance Committee, was afforded an opportunity to testify, and did testify to a limited

extent. He was not denied the opportunity to defend himself before such committee. This point is overruled.

[21, 22] Appellant next complains of error in "failing to require the State to prove the alleged acts of misconduct by the 'clear and convincing' standard instead of the 'preponderance of the evidence standard.'" The charge given by the trial court required the jury to make affirmative answers to the issues submitted based upon a preponderance of the evidence. Appellant made no objections to this standard of proof. In the absence of objection, any complaint regarding form or substance of any special issue was waived. *Traylor v. Gray*, 547 S.W.2d 644 (Tex.Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *Ives v. Webb*, 543 S.W.2d 907 (Tex.Civ.App.—Corpus Christi 1976, no writ); *Crutcher-Rolfs-Cummings, Inc. v. Ballard*, 540 S.W. 2d 380 (Tex.Civ.App.—Corpus Christi 1976, writ ref'd n.r.e), cert. denied, 433 U.S. 910, 97 S.Ct. 2978, 53 L.Ed.2d 1095 (1977); *Tex.R.Civ.P. 272*. If such an objection to the charge had been timely made, we would overrule this point. The proper standard of proof of all issues in this disbarment proceeding is by a preponderance of the evidence. See *In the Matter of Bates*, supra; *In re Brown*, 512 S.W.2d 317, 330 (Tex.1974); *Drake v. State*, supra.

Appellant's twenty-fourth point complains of error in that "[t]he 93rd District Court erred in ruling on the motion to recuse himself rather than referring the motion to the Presiding Judge of the Administrative District." This case was originally docketed in the 93rd District Court, Hidalgo County. During the pendency of this proceeding, counsel for appellee, by a letter to Judge Joe A. Cisneros, Judge of the 93rd District Court, suggested to the judge that he recuse himself "from this case without any further involvement and allow the presiding judge to appoint someone else." At a "hearing concerning this letter," counsel

for appellant and appellee both stated they did not consider the letter as a motion to recuse, but the court stated he would consider the letter as such a motion. During this informal meeting in Chambers, there was a lengthy colloquy between the court and counsel which was concluded by this statement by the Judge:

> "I am going to recess this motion and give you time to work with Judge Alamia [the Presiding Judge of the Administrative District] and see if you cannot agree on another judge to come and sit in the case. Either by recusal or by assignment, or by transfer or whichever way you want to handle it."

The next thing appearing in the record with reference to this matter is an Order of Transfer stating:

> "Be it remembered that by the consent order of the Judges of Hidalgo County District Courts, the following entitled and numbered causes are hereby Ordered transferred from the 93rd District Court of Hidalgo County Texas, to the 206th District Court of Hidalgo County Texas, to wit:
>
> "Cause No. C-7178-78-B
>
> "The State of Texas vs. Oscar B. McInnis
>
> "Done and entered this the 14th day of March, 1979.
>
> /s/ Judge 93rd District Court Hidalgo County, Texas
>
> /s/ Joe B. Evins Judge, 206th District Court, Hidalgo County, Texas."

[23] *Tex.Rev.Civ.Stat.Ann. art. 200a*, § 6 (Supp. 1980-1981) provides, inter alia:

> "A District Judge shall request the Presiding Judge to assign a judge of the Administrative District to hear any motions to recuse such district judge from a case pending in his Court."

Where such a motion to recuse has been filed, the trial judge is under a mandatory duty to make such request from the Presiding Judge of the Administrative District. See *McLeod v. Harris*, 582 S.W.2d 772 (Tex. 1979); *Society of Separationists, Inc. v. Strobel*, 539 S.W.2d 855 (Tex.Civ. App.—Austin 1980, no writ). However, the Supreme Court in *McLeod v. Harris*, supra, points out that under the terms of this statute the motion to recuse does not in itself disqualify the local judge. The statute merely prohibits the local judge from passing upon the merits of the motion, requiring that another judge be assigned to determine the merits of the motion.

In the present case, the record clearly shows that Judge Cisneros did not rule upon the motion to recuse, but stated he would give counsel time and the opportunity to consult with the Presiding Judge of the Administrative District for the purpose of agreeing upon another judge to try the case. We note that appellant, in his "Motion to Strike and Answer to Motion to Disqualify," states:

> "Defendant McInnis has heretofore offered in writing to agree that this case may be heard by either the Honorable Joe A. Cisneros of the 93rd District Court (where now pending), the Honorable Joe B. Evins of the 206th District Court, or the Honorable Fidencio M. Guerra of the 139th District Court, all District Judges of Hidalgo County, Texas. . . ."

This case was assigned to and tried by Judge Evins, and appellant makes no complaint of the order transferring this case to the 206th District Court. The only complaint made by appellant is that Judge Cisneros ruled upon and denied the motion to recuse. The record before us does not support this complaint. To the contrary, the record shows that Judge Cisneros did not rule upon the motion but referred the matter to Judge Alamia, the Presiding Judge of the Administrative District. Appellant has failed to show any error in this proceeding. This point is overruled.

We have carefully considered all other points brought forward and overrule them as being without merit.

Finding no error, the judgment of the trial court is affirmed.

AFFIRMED.

APPENDIX "C"

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

Dec. 16, 1981

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of McINNIS v. STATE, No. C-642, was this day refused. No reversible error.

Very truly yours,

Garson R. Jackson, Clerk

APPENDIX "D"

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

Jan. 13, 1982

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of McINNIS v. STATE, No. C-642 was this day OVERRULED.

Very truly yours,
Garson R. Jackson, Clerk

APPENDIX "E"

(Filed January 28, 1982)

NO. 8548

OSCAR B. McINNIS
APPELLANT

V.

THE DISTRICT GRIEVANCE COMMITTEE FOR DISTRICT 12-B OF THE STATE BAR OF TEXAS, ACTING IN THE NAME OF THE STATE OF TEXAS
APPELLEE

ORDER

Appellant's motion to stay the issuance of the mandate in the above captioned cause, invoking this Court's authority under *28 U.S.C. § 2101(f)*, is granted. The stay herein granted shall expire on April 12, 1982, unless further extended by the order of a court of competent jurisdiction.

Entered this the 28th day of January, 1982.

PER CURIAM

APPENDIX "F"

In the name and by the authority of

The State of Texas

THIS IS TO CERTIFY, That at a general election held on Tuesday, November 7th, A.D. 19 78 :

OSCAR B. McINNIS

was duly elected

CRIMINAL DISTRICT ATTORNEY OF HIDALGO COUNTY

In testimony whereof, I have hereunto signed my name and caused the Seal of State to be affixed at the City of Austin, this the 24th day of November A.D., 19 78

Governor of Texas

Attest:

Secretary of State

APPENDIX "G"

(Filed September 13, 1979)

NO. C-2178-78-D

IN THE DISTRICT COURT OF
HIDALGO COUNTY, TEXAS
206TH JUDICIAL DISTRICT

THE STATE OF TEXAS

VS.

OSCAR B. McINNIS

DEFENDANT'S FIRST MOTION FOR CONTINUANCE

NOW COMES Oscar B. McInnis, the Defendant in the above entitled and numbered cause, and files this, his First Motion for Continuance, and in support of such Motion shows the Court as follows, to-wit:

1.

The above entitled and numbered cause is set for trial on the merits before a jury on September 17, 1979. This suit was filed by the State of Texas, acting herein by and through the Grievance Committee for District 12B of the State Bar of Texas, Plaintiff, and seeks to Disbar the Defendant as a practicing attorney in the State of Texas on certain alleged grounds set out in Plaintiff's petition. The said suit was filed during November of 1978.

2.

This case is the most recent of several causes, criminal and civil, which have been brought against this Defendant.

During the summer of 1978, this Defendant was the subject of several criminal indictments in the United States District Court in and for the Southern District of Texas. In the summer of 1978, he was also charged with a State criminal offense by indictment in the District Court of Hidalgo County, Texas. Subsequently, all federal criminal proceedings against the Defendant were dismissed by action of the trial court and the State charges against the same Defendant were dismssed on Motion by the State of Texas.

3.

In August of 1978, a further proceeding was filed against this Defendant by the Texas Prosecutors Coordinating Council, under the provisions of Article 332d of the Revised Civil Statutes of Texas, seeking to remove this Defendant from his office as Criminal District Attorney of Hidalgo County, Texas. This suit has proceeded through the Courts and is now pending on Application for Writ of Error to the Supreme Court of Texas.

4.

The Defendant herein is not now serving as Criminal District Attorney of Hidalgo County, Texas, because of the pendency of the removal suit last mentioned. Likewise, this Defendant is not presently engaged in the private practice of law. He maintains no office as an attorney at law and is not collecting fees of any kind for the private practice of law.

5.

At the time this case was assigned a trial date of September 17, 1979, there was not pending against this Defendant any criminal charges, except that the prosecution in the federal criminal cases had perfected an appeal

to the 5th U.S. Circuit Court of Appeals attacking the action of the United States District Judge who had dismissed all charges against this Defendant. As the Court knows, under State procedure, the prosecution is not entitled to an appeal from an Order of Dismissal by a trial judge. However, under federal procedure, the United States can appeal, in certain instances, in criminal cases, though government appeals in criminal cases are exceptional and not favored by Courts, and must be based on express statutory authority. *United States vs. Koenig*, 290 F.2d 166, aff'd, *DiBella vs. U.S.*, 82 S.Ct. 654, 369 U.S. 121, 7 L.Ed.2d 614.

6.

On Tuesday, September 11, 1979, the news media, including newspapers, television stations, and radio stations, carried extensive news stories reporting that the 5th U.S. Circuit Court of Appeals had ruled on Monday, September 10, 1979, that this Defendant "must stand trial on a charge of lying to a federal grand jury in Brownsville on June 7, 1978." Copies of front page news stories from the *Valley Morning Star* and the *Corpus Christi Caller* are attached hereto and marked, respectively, Exhibits "A" and "B". Such newspapers have wide circulation throughout the Rio Grande Valley of Texas and specifically in Hidalgo County, Texas, where they are virtually the only daily morning newspapers in circulation.

7.

At the time of the filing of this Motion, neither the Defendant, Oscar B. McInnis, nor the attorneys representing him in this cause have received, been served with, or read the actual Opinion of the said United States Circuit Court of Appeals. The Defendant and his attorneys must, however, assume that the news articles so published are

accurate to the extent that such Court of Appeals has ruled that at least a portion of the criminal charges brought against the Defendant in Federal Court have been revived and reinstated and that, under the current Opinion of the said Court of Appeals, the Defendant again faces active criminal charges in the Federal Courts.

8.

As grounds for this Motion for Continuance, the said Defendant, Oscar B. McInnis, now respectfully shows this Court as follows, to-wit:

A. The criminal case now again pending against this Defendant in Federal Court, should take precedence over this case, which is a civil action only. In the criminal case, the government seeks to impose penalties on the Defendant which could include imprisonment. In the civil case, the State of Texas seeks to deprive the Defendant of his license to practice law and to thus disbar him and render him ineligible to hold the office of Criminal District Attorney of Hidalgo County, Texas.

B. The Defendant is not presently serving as Criminal District Attorney of Hildalgo County, Texas, due to the pendency of the removal suit hereinabove mentioned, and as previously stated, the Defendant is not currently engaged in the private practice of law. Indeed, under the provisions of the "Professional Prosecutors Act" passed by the 66th Legislature which is published in Vernon's Texas Session Law Service, Volume 5, Pages 1708 *et seq.* and which became effective August 27, 1979, the Criminal District Attorney of Hidalgo County, Texas may not engage in the private practice of law.

C. For the reason set out in the last sub-paragraph, there is no urgency and no overriding public interest to

be served by rushing this disbarment suit to trial while a serious criminal accusation against the Defendant is alive and pending in Federal Court and a suit seeking the removal of McInnis from office is alive and pending in the Supreme Court of Texas.

9.

The Defendant further shows the Court that a great injustice will result to him if he is put to trial in this suit for disbarment while the federal criminal case against him is yet alive and pending for the following reasons:

A. This lawsuit is a civil suit. Nevertheless, the Defendant herein is entitled, under the Constitution of the United States and the State of Texas, to decline, on constitutional grounds, to testify or to give evidence which might in any respect incriminate him or lead to evidence that would tend to incriminate him in any way. If this case proceeds to trial, the Defendant and his attorneys must make a decision at some stage in the trial proceedings, as to whether to avail himself of his constitutional privilege or whether to waive his constitutional privilege which could work to his detriment in the criminal proceedings against him. The Defendant is represented by different counsel in the criminal prosecution and in this civil case. It is the duty of his counsel in each case to give to the Defendant the best possible legal advice pertaining to that case, including the advice as to whether or not the Defendant should avail himself of his constitutional privilege or waive the same. The Court can take judicial notice of the fact that such advice may well be conflicting and can result in this Defendant being deprived of the benefit of counsel in this regard.

10.

This Motion for Continuance is also made for the purpose of avoiding a multiplicity of actions and the undue expense that will result both to the public and to the Defendant if this case proceeds to trial as scheduled on September 17, 1979. This disbarment case is largely based upon exactly the same allegations of fact which are the subject of the perjury charges against the Defendant in Federal Court. The Plaintiff's First Amended Formal Complaint, which was filed within the last few days, attaches as Exhibit "A" a 35-page transcript, which purports to be a transcript of the testimony of this Defendant before the Federal Grand Jury sitting in Brownsville, Texas on the 7th day of June, 1978. The said Petition just filed charges the Defendant was giving false testimony before said Federal Grand Jury on such date, and such charges are made in paragraph VI, VII, VIII, IX, and X (Counts Six, Seven, Eight, Nine, and Ten). The Defendant is, therefore, to be put to trial in this civil case on exactly the same accusations made against him by the United States in the criminal case, to-wit: that he lied to a Federal Grand Jury. The Defendant respectfully asks the Court to consider the affect on the Defendant and on the public of the various courses of action as follows:

A. If this case (the civil disbarment suit) is continued pending the federal criminal trial, approximately two to three weeks of State Court time will be conserved, double attendance by witnesses at public expense will be avoided, and the federal criminal prosecution can proceed in an orderly fashion with the Defendant's constitutional rights properly protected. If the Defendant is convicted in Federal Court, his conviction would result in automatic disbarment and automatic disqualification to hold the office of Criminal District Attorney of Hidalgo County, Texas

now or at any other time in the future. If the Defendant should be acquitted in Federal Court, the State of Texas may still elect to proceed with this suit for disbarment and its prior action for removal from office. The public interest will be preserved and the rights of the Defendant will not be imperiled.

B. If, on the other hand, this case is forced to trial on the merits prior to the federal criminal prosecution, this Court and a jury to be selected under this Court's direction will spend many days listening to the testimony of some twenty-one (21) witnesses who have been subpoenaed by the Plaintiff, State of Texas, and some twenty-five (25) witnesses who have been subpoenaed by the Defendant, Oscar B. McInnis. At the end of such testimony, the jury will be charged to reach a verdict by "a preponderance of the evidence" (the civil burden). If the verdict is unfavorable to the Defendant, the resulting publicity would be so widespread as to taint any jury that might later be summoned to try the Defendant at Brownsville, Texas on the criminal charges against him. If the verdict was favorable to the Defendant, nothing would really have been resolved since the Defendant would still face criminal charges in which a fresh set of prosecutors would call virtually the same witnesses to testify on the same fact situation in an attempt to incarcerate the Defendant and convict him of a felony which would result in his disbarment despite the favorable finding of an Hidalgo County jury in this cause.

11.

This Defendant says that the above entitled and numbered cause should be continued because of the undue publicity which has occurred this very week following the action of the United States Court of Appeals for the 5th

Circuit in the ruling which is reflected in Exhibits "A" and "B" attached hereto. The Defendant says that the attached exhibits were front page articles on both of the morning papers in general distribution in Hidalgo County, Texas and that similar articles were carried in all afternoon papers and weekly papers of general circulation in this County. Likewise, the news concerning the action of the New Orleans Court was lead story on all televisions news broadcasts on Monday, September 10, 1979 and Tuesday, September 11, 1979, and follow-up stories have been carried throughout the week. All radio stations broadcasting in South Texas have carried repeated stories to the effect that McInnis must stand trial in Federal Court at Brownsville, and that the United States Court of Appeals reversed the action of the United States District Judge who dismissed the perjury charges against McInnis. It will be impossible to impanel twelve (12) jurors in Hidalgo County on Monday, September 17, 1979, who will be able to expunge from their minds the effect of this bombardment of publicity regarding the McInnis criminal prosecution. The Defendant should not be put to trial in a case which is designed to deprive him of his right to practice his profession and earn a livelihood therefrom at a time when publicity against him is at its very peak and the interest of justice will be served by continuance of this cause for a reasonable period of time.

12.

It cannot be doubted that this Honorable Court, in the exercise of its discretion, and for all of the reasons above set out has ample power and authority to take a practical and just approach to the scheduling of this case and to defer the trial of this civil action pending an orderly disposition of the criminal case herein mentioned.

13.

As an additional reason for continuance, it is respectfully shown to the Court that the Court, Defendant, and counsel for both the State of Texas and the Defendant should have an opportunity to read and study the Opinion of the United States 5th Circuit Court of Appeals which is mentioned and referred to in Exhibits "A" and "B" attached hereto before this case proceeds to trial. It is probable that there are pronouncements of law contained in such Opinion which would affect the trial of the case at bar, and this case should not proceed to trial with all parties in ignorance of the law as found by such Circuit Court of Appeals on the very fact situation which is under consideration here. Furthermore, it is probable that it will be necessary for the Defendant and Mr. Frank Maloney of Austin, Texas, his attorney in the federal criminal cases, to confer together and to file motions or pleadings in the said New Orleans Circuit Court of Appeals during the same period of time that will be consumed in the trial of this disbarment suit and it would be unjust in the extreme to require the Defendant to fight on two fronts simulanteously to the detriment of his defense in both matters.

13.

This Motion is not made for delay only, but that justice may be done.

Respectfully submitted,

Jones & Lewis
P. O. Box 2285
McAllen, Texas 78501
Law Offices of Jack Skaggs
P. O. Box 2999
Harlingen, Texas 78550
By: /s/ John E. Lewis

Of Counsel

STATE OF TEXAS)
COUNTY OF HIDALGO)

BEFORE ME, the undersigned authority, on this day personally appeared OSCAR B. McINNIS, the Defendant in the above entitled and numbered cause, who, upon oath, said that all matters of fact set out in the above and foregoing Motion are true and correct.

/s/ Oscar B. McInnis
Oscar B. McInnis

SUBSCRIBED AND SWORN TO before me this the 15th day of September, 1979.

/s/ Stella Jenson
Notary Public in and for
Hidalgo County, Texas

My commission expires: (Illegible)

APPENDIX "H"

(Filed September 17, 1979)

NO. C-2178-78-D

IN THE DISTRICT COURT,
206TH JUDICIAL DISTRICT
HIDALGO COUNTY, TEXAS

THE STATE OF TEXAS

V.

OSCAR B. McINNIS

DEFENDANT'S MOTION FOR A SEVERANCE

TO SAID HONORABLE COURT:

Now comes the Defendant in the above entitled and numbered cause and makes this, his motion under Rules 41, 174(b), and other portions of the Texas Rules of Civil Procedure relating to severance and separate trials, for a severance and a separate trial of certain issues herein, and in support of said motion, respectfully shows the Court as follows, to wit:

I.

This Defendant has previously made and presented to the Court his first Motion for Continuance, which said motion is here and now referred to for all purposes and made a part hereof by reference the same as if the said facts alleged in said motion and the said arguments made in the motion were herein again set out in full.

II.

The said Motion referred to in the last paragraph was heard by the Court and was denied on the 13th day of September, 1979.

III.

The Defendant now shows the Court that in furtherance of convenience and to avoid prejudice, a separate trial should be ordered on certain claims and separate issues contained and set out in the Plaintiff's First Amended Formal Complaint, all as provided by Rule 173 of the Texas Rules of Civil Procedure, and as permitted and contemplated by Rule 41 of the said Rules. Those claims and issues which should be tried separately are further identified below.

IV.

In Paragraph X of the said Plaintiff's First Amended Formal Complaint, there are contained ten Counts in which ten separate acts of professional misconduct are alleged against this Defendant. It is the contention of the Plaintiff that the Defendant McInnis could and should be disbarred on the basis of any of said ten Counts. Counts One through Five are each separate and independent from Counts Six through Ten. In Counts One through Five, the Defendant is variously charged with prosecuting a criminal case growing out of the same acts as existed in a civil case (Count One); having criminal charges filed against one Noe Villanueva merely to harrass and injure him (Count Two); and having possession of marijuana charges filed against Noe Villanueva when the charges were unsupported by probable cause (Count Three); and presenting criminal charges against Noe Villanueva to obtain an advantage in a civil matter (Count Four); and

soliciting and attempting to induce Daniel J. Rodriquez to cause the death of Noe Villanueva (Count Five).

Counts Six through Ten are each based on allegations that the Defendant McInnis made five separate false statements to a Federal Grand Jury at Brownsville, Texas, on the 7th day of June, 1978, and in support of such Counts Six through Ten, the Plaintiff attaches to Plaintiff's live pleading, Exhibit "A" which purports to be a thirty-five page transcript of the testimony of the Defendant before the Federal Grand Jury sitting at Brownsville, Texas, on the 7th day of June, 1978.

V.

The Defendant says that the Counts One through Five are readily and easily severable from Counts Six through Ten and that if the Court does proceed to trial on the merits of this cause on September 17, 1979, that the Court should, under Rule 174, for convenience, and to avoid prejudice, order a separate trial of Counts One through Five at the present time, and order that a separate trial will be held at a later date on Counts Six through Ten contained in Plaintiff's said live pleading, and in further support of such motion, the Defendant shows the Court as follows.

VI.

The Defendant has pointed out to the Court in his First Motion for Continuance that the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, did on Monday, September 10, 1979, rule that the Defendant must stand trial in the Southern District of Texas, Brownsville Division, on criminal indictments charging him with perjury alleged to have been made before the Federal Grand Jury on June 7, 1978. At the time of the filing of said Defendant's First Motion for Continance, he

did not have access to a copy of the opinion of the said Fifth Circuit Court of Appeals, but the Plaintiff has now supplied the Defendant with a copy of said opinion styled "United States v. McInnis," and said opinion is attached hereto and marked Exhibit A and referred to for all purposes.

In the Defendant's Motion for Continuance (herein now again referred to), the Defendant pointed out that he would be extremely prejudiced in many respects if he is put to trial in this civil case seeking his disbarment, prior to the time that he is called upon to defend himself in the criminal case charging him with perjury. As pointed out in the Defendant's Motion for Continuance, the burden of proof in this civil case (a preponderance of the evidence), is different from the burden of proof which will obtain in the criminal case (guilty beyond a reasonable doubt). As further pointed out, the Defendant will be called upon at some point in the proceedings in the case at bar to make an election as to whether or not he will insist upon or will waive his constitutional right to remain silent and to not give testimony that might tend to incriminate him, or might open up avenues of investigation that could prejudice his rights in the criminal prosecution for perjury. There is now a ready remedy available to the Court to avoid the prejudice that will result from a trial of this case on the merits at the present time, to wit: the ordering of a separate trial on all counts involving perjury or false statements before the Federal Grand Jury on June 7, 1978.

VII.

Furthermore, convenience will be served by such an order for a separate trial in that many days of testimony will be avoided, it will not be necessary for the Court to hear evidence and make rulings on various highly contested

legal issues (such as the propriety of permitting the Plaintiff to introduce the secret Grand Jury proceedings into evidence). The Defendant refers the Court to the Fifth Circuit Court opinion attached hereto to demonstrate the savings of time and expense and therefore the convenience of ordering a separate trial on the false statement Counts (Five through Ten). In Footnote 4 on page 7378 of the opinion, the Fifth Circuit Court has described in detail the circumstances that led up to the appearance of Oscar McInnis before the Federal Grand Jury at Brownsville. The Court's synopsis reveals a tangled skein of moves and counter-moves on the part of the officers and officials involved in McInnis' Grand Jury appearance. The Plaintiff has subpoenaed as witnesses in the case at bar Mr. Ron Woods, an Assistant United States Attorney from Houston, Texas, whose only known connection with this case is that he questioned Oscar McInnis before the Federal Grand Jury on June 7, 1978 (see Exhibit A attached to Plaintiff's First Amended Formal Complaint). The Plaintiff has also subpoenaed several FBI agents from outside of Hidalgo County, Texas, who were presumably involved in the events leading up to the appearance of McInnis before the Grand Jury on June 7, 1978. The Fifth Circuit Court opinion sets out the six charges of perjury against McInnis pending in Federal Court (on page 7379), and the Court will note that of the six perjury Counts against McInnis in Federal Court, five are mirrored and restated in almost the identical language of the perjury indictments in Counts Six through Ten of Plaintiff's First Amended Formal Complaint. It is therefore obvious that unless this Court orders a separate trial of Counts Six through Ten, a Hidalgo County jury and people of Hidalgo County and the Hidalgo County courts will have accepted the responsibility of trying the Defendant in advance on the perjury counts which are to be tried in Federal Court, and in addition, will have assumed

the burden of trying the Defendant on the charges of purely professional misconduct set out in Counts One through Four plus the offense of solicitation of murder (Count Five) which has been dismissed by the Federal District Court and which dismissal has been affirmed by the Fifth Circuit Court of Appeals. A multiplicity of actions will be avoided by the separate trials herein requested, and there will be great saving of time and expense to the State, the Defendant, and to Hidalgo County.

VIII.

Though extreme prejudice will result to this Defendant if all ten Counts of professional misconduct which are asserted against him are tried in this proceeding at this time, no prejudice will result to either party or to the State or to the United States if a separate trial is ordered on the first five Counts separately and the second five Counts are severed out to be considered at a later date.

IX.

If the Defendant is tried herein pursuant to the present setting on the first five Counts alleged by the Plaintiff, the Plaintiff will have a full and fair opportunity to present its entire theory as to why the Defendant should be subjected to the penalty of disbarment. The first four Counts contain within them all charges relating to what Plaintiff claims to be the purely professional misconduct of the Defendant, plus Count Five which is the accusation out of which this entire sorry affair arose, that the Defendant "solicited and attempted to induce Daniel J. Rodriquez to cause the death of Noe Villanueva." The remaining six Counts all grew out of the Defendant's Grand Jury testimony. The United States, through criminal indictment, charges that the Defendant is guilty of "perjury." The

Plaintiff, through civil complaint, charges that the Defendant is guilty of "false statements" in the same respects. The Plaintiff says that it need not prove "perjury"; it only need prove "lies." The United States says that such "lies" amounted to perjury. A separate trial of Counts One through Five from Counts Six through Ten would achieve the following result:

1. If the Defendant is convicted of one or more of Counts One through Five, he will presumably suffer an appropriate reprimand, suspension, or disbarment in his professional capacity.

2. He will then be tried in Federal Court on the accusation of perjury, and if convicted, will suffer the appropriate penalty including disbarment or suspension.

3. If he be exonerated by the jury in this case on all of the first five Counts, he will still face the prosecution in Federal Court.

4. If he be exonerated on the first five Counts and acquitted at Brownsville in the Federal proceeding, the Plaintiff may, if it so elects to do so, proceed to trial on the second five Counts in its Complaint, and at that time resume its position that though McInnis may not have been (beyond a reasonable doubt) guilty of the crime of perjury, he is nevertheless subject to being disbarred, if the jury believes (by a preponderance of the evidence) that he lied.

X.

The Defendant says that under the authority in *Womack v. Berry*, 291 S.W.2d 677 (Sup.Ct. 1956), that this is a case in which all the circumstances unquestionably require severance of the claims asserted by the Plaintiff in order to prevent manifest injustice, and that there is no

circumstance supporting a contrary conclusion and that the legal rights of the parties hereto will not be prejudiced thereby, but that justice requires and that the public interest likewise requires that this Motion for a Severance by, the Court, granted.

WHEREFORE, the Defendant respectfully prays the Court to grant this Motion for a Severance and a separate trial, and to enter an appropriate order severing those claims contained in Plaintiff's live pleading which relate to Counts One through Five from those claims and allegations relating to Counts Six through Ten, and that thereafter, if the Court should still rule that the Defendant is not entitled to a continuance of this cause in its entirety, that the Court proceed to trial on Counts One through Five, and hold Counts Six through Ten together with the allegations supporting the same in abeyance for a separate trial at a later date; and for such other and further orders as may to the Court seem proper under the circumstances.

Respectfully submitted,

Law Offices of Jack Skaggs
P. O. Box 2999
Harlingen, Texas 78550

Jones & Lewis
P. O. Box 2285
McAllen, Texas 78501

By: /s/ John E. Lewis
John E. Lewis, Of Counsel

and

/s/ Jack Skaggs
Jack Skaggs, Co-Counsel
Attorneys for Defendant

APPENDIX "I"

(Filed September 17, 1979)

NO. C-2178-78-D

IN THE DISTRICT COURT
206TH JUDICIAL DISTRICT
HIDALGO COUNTY, TEXAS

THE STATE OF TEXAS

VS.

OSCAR B. McINNIS

MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

Oscar B. McInnis, Defendant herein, files this, his Motion in Limine prior to the impanelling or selection of a jury and the beginning of a trial herein and would respectfully show the Court:

I.

Defendant McInnis moves the Court to instruct Plaintiff's counsel and that they in turn be instructed to advise their witnesses to not refer to, directly or indirectly, in the presence and hearing of the jury or to offer into evidence or attempt to get in front of the jury any of the following matters unless and until they have first approached the Court and advised the Court, and Defendant's counsel, that they propose to go into such matters, to-wit:

1. Any recordings or tapes of any conversation between Defendant McInnis and any other person or per-

sons. In this connection McInnis would show that the admissibility and materiality of all or portions of any such recording or tapes is in issue and that in any event a necessary predicate will have to be laid before the same or any part thereof would be admissible for any purpose and that an In Camera hearing and playing of the same should be conducted by the Court out of the presence and hearing of the jury in order for Defendant and his attorneys to listen to the same and to make their objections, if any, to the admissibility of all or any part of such recordings or tapes. It would be extremely harmful and prejudicial to this Defendant for any references to such tapes or recordings to be made or the same of any part thereof be offered into evidence if the Court subsequently sustained an objection to the admissibility of the same. There would be no way to get the harmful or prejudicial effect of such evidence out of the minds of the jury by instructions or otherwise.

2. The alleged Federal Grand Jury testimony of Defendant McInnis and the purported transcript thereof. Any reference to the same or attempt to offer the same in evidence in the presence and hearing of the jury unless and until a proper predicate for the same has been laid and prior to the legal requirements for the admissibility of the same having been established would be extremely prejudicial and harmful to Defendant McInnis and the adverse prejudicial effects of the same could not be removed from the minds of the jury even by instruction of the Court if the Court subsequently ruled and held that such Federal Grand Jury testimony or transcript thereof was not admissible.

3. Any attempts to show in the presence and hearing of the jury or any references or inferences that McInnis is accused in this proceeding of having committed a crime

or violation of the law or that any act that he is charged with herein constitutes a crime or violation of the law. In this connection the Plaintiff has represented to the Court that it is not alleging or contending that McInnis committed any crime or violation of any law in connection with any of the acts he is charged with herein and to allow them to now infer that he has committed a crime or violated a law or to introduce any evidence to this effect with respect to any of the acts that he is accused of would be extremely harmful and prejudicial to Defendant.

4. To call or attempt to call Defendant McInnis to the witness stand in the presence or hearing of the jury and to compel him to claim in the presence and hearing of the jury his constitutional privilege against self-incrimination. The Plaintiff having been advised repeatedly during the progress of this proceeding that Defendant McInnis desires to and will claim his constitutional privilege against self-incriminaton if called to the witness stand and the only effect of the Plaintiff's calling him to the witness stand under such circumstances would be to unduly prejudice and harm him in front of the jury and without doubt would have that effect.

5. Any documents, correspondence or written materials of any kind seized from the personal files of Defendant McInnis without his prior knowledge or consent. All of the same that Plaintiff proposes to offer into evidence should be produced In Camera for prior inspection and examination by the Court, Defendant and his counsel, so that the Court could first determine the admissibility of the same and Defendant be given an opportunity to voice his objections, if any, to any of such material. It would be extremely prejudicial and harmful to Defendant if he was forced to voice objections to any offering of any

of the same in the presence and hearing of the jury if the Court should determine that any of the same was inadmissible and the adverse effect flowing from this could not be remedied by any instruction to the jury by the Court.

6. The attendance of all or parts of (except a designated representative) the local Grievance Committee in Court during trial. The present Grievance Committee is composed of some twenty (20) members; composed of prominent attorneys and some lay members from this area. Undoubtedly some members of the jury panel will have been represented or may at the present time be represented by some attorney members of such Grievance Committee and many of the lay members on such Grievance Committee will be acquainted with and have had some dealings with some members of the jury panel. If the members of such Grievance Committee attend this trial and are identified as being one of the Plaintiffs herein it will be necessary for the Defendant on voir dire examination to question each prospective juror about his acquaintance with, connection with or relationship to each member of such Grievance Committee and would unduly lengthen and hinder jury selection herein. Further, while the Defendant would ordinarily be entitled to only six (6) pre-emptory challenges in his jury selection, the identification of each member of the existing Grievance Committee as a party Plaintiff and the undoubted acquaintance, association or dealing of a large portion of the jury panel with various members of such Grievance Committee would make it virtually impossible for the Defendant to eliminate from the jury by six (6) pre-emptory challenges numerous prospective jurors that he under ordinary circumstances could and would eliminate from such jury. To permit the various members of the Grievance Committee to be in attendance in the trial hereof as Plaintiffs and to be

identified as such would in the opinion of Defendant necessitate the Court in giving Defendant additional peremptory challenges over and above the usual six (6) which he would be entitled to under ordinary circumstances. The effect of and the only purpose for the attendance of the members of the Grievance Committee as Plaintiffs during this trial would be to unduly harm and prejudice this Defendant with the jury and to convey to the jury that after their investigation of the circumstances and charges that they, the members of the Grievance Committee, believed Defendant to be guilty of the acts charged and that such acts required some disciplinary action against the Defendant as a lawyer. The truth of the matter is that the present Grievance Committee is composed of many members that were not on the Grievance Committee at the time the McInnis matter was considered and many members of the Grievance Committee did not in fact participate in the Grievance Committee's handling of the McInnis matter. The Plaintiff herein has on many occasions during the progress of this case told the Court that the function of the Grievance Committee in matters such as this was analogous to that of a Grand Jury and to permit the members of the Grievance Committee to attend the trial of this case as Plaintiffs would be the same as permitting a Grand Jury who had rendered an indictment against a Defendant to attend his subsequent trial as Plaintiffs. The prejudicial effect of this to McInnis and to his right to a fair and impartial trial is apparent and the Court should exclude such members of such Grievance Committee (except a designated representative thereof) from the trial of this case and their identification as individual members thereof as Plaintiffs herein should be excluded. In the alternative, in the event this motion and request by the Defendant is denied by the Court, De-

fendant McInnis should be given additional pre-emptory challenges.

WHEREFORE, Defendant McInnis respectfully moves that the above and foregoing Motion in Limine be, in all things granted and for general relief.

Respectfully submitted,

Law Offices of Jack Skaggs
P. O. Drawer 2999
Harlingen, Texas 78550

Jones & Lewis
P. O. Drawer 2285
McAllen, Texas 78501

By: /s/ John E. Lewis
John E. Lewis,
Of Counsel

and

/s/ Jack Skaggs
Jack Skaggs
Co-Counsel

Attorneys for Defendant

APPENDIX "J"

NO. C-2178-78-D

IN THE DISTRICT COURT
206TH JUDICIAL DISTRICT
HIDALGO COUNTY, TEXAS

THE STATE OF TEXAS

VS.

OSCAR B. McINNIS

ORDER

BE IT REMEMBERED that on the 13th day of September, 1979, there was held a Pre-Trial Hearing in the above entitled and numbered cause at which time all parties were present in person and by and through their attorneys of record, and at such time, the Defendant's First Motion for Continuance was, and the same is hereby overruled.

BE IT FURTHER REMEMBERED that on the 17th day of September, 1979, and before the selection of a jury was commenced in the above entitled and numbered cause, a further Pre-Trial Hearing was held at which time the following rulings of the Court were made:

1. Defendant's Second Plead in Abatement was overruled and the Plaintiff's oral request to interline in the first paragraph of Plaintiff's First Amended Formal Complaint was granted, and said interlineation was made and is shown on the filed copy of the said Plaintiff's Complaint.

2. The Defendant's Motion for a Severance was denied and overruled, to which Defendant then and there in open Court excepted.

3. The Defendant's Motion in Limine was carried along to be ruled upon as the case progressed.

To all of which action of the Court adverse to him the Defendant duly excepted.

SIGNED FOR ENTRY this 9th day of October, 1979, but *nunc pro tunc* as of the dates upon which the said actions of the Court were taken as above set out.

/s/ Joe B. Evins
Judge Presiding

APPENDIX "K"

(Filed September 1, 1978)

C-1766-78-B

IN THE DISTRICT COURT
OF HIDALGO COUNTY
92ND JUDICIAL DISTRICT

STATE OF TEXAS

VS.

OSCAR B. McINNIS

ORIGINAL PETITION FOR REMOVAL

NOW COMES the State of Texas through the Texas Prosecutors Coordinating Council and files this petition seeking the removal of Oscar B. McInnis from the office of Criminal District Attorney of Hidalgo County and shows the Court the following:

I.

Authority

This action is brought by authority of Article 332d § 10 VACS.

II.

Parties and Service

The State of Texas is the plaintiff and its address is Texas Prosecutors Coordinating Council, P.O. Box 13555, Austin, Texas 78711. Oscar B. McInnis is the defendant and may be served at the Criminal District Attorney's office at the Courthouse in McAllen, Texas or at 625 Camellia, McAllen, Texas 78501, his residence.

III.

Venue

Venue in this case lies in Hidalgo County, the residence of the defendant in accordance with Article 332d § 10 (k) VACS.

IV.

Grounds

A.

Summary

The defendant is guilty of misconduct as that term is defined, VACS, Article 332d § 10(b)(2). This misconduct involves aggravated perjury, perjury, solicitation of capital murder and of murder, conspiracy to commit capital murder and to commit murder, violations of V.T.C.A. Penal Code § 33.01, and wilful conduct which is clearly inconsistent with the proper performance of his official duties.

THE STATE OF TEXAS

County of HIDALGO

I, LUCILA TREVIÑO, Clerk of the 93RD DISTRICT Court, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of the first page of the Original Petition for Removal filed on September 1,1978. (CASE STILL PENDING)

In Cause No.C-1766-78-B

wherein

THE STATE OF TEXAS — Plaintiff

and

OSCAR B.McINNIS — Defendant

as the same appear

Given under my hand and seal of office, at EDINBURG, Texas, this the 18TH day of FEBRUARY, A. D. 1981

Clerk 93RD DISTRICT Court, HIDALGO County, Texas.

By Femia Rodriguez Deputy.
FEMIA RODRIGUEZ

APPENDIX "L"

(Filed September 28, 1979)

NO. CR-652-78-D

IN THE 206TH DISTRICT COURT
OF HIDALGO COUNTY, TEXAS

THE STATE OF TEXAS

VS.

OSCAR B. McINNIS

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

On this the 5th day of January, 1979, came on to be heard the Defendant's Motion To Suppress all tape recordings and transcriptions thereof of conversations between Daniel Rodriquez and the Defendant Oscar McInnis, and all tape recordings and transcriptions thereof of the Defendant's testimony before the Grand Jury of the United States District Court for the Southern District of Texas, Brownsville Division, and the Court heretofore on November 13, 14 and 15 of 1979 having heard evidence thereof, having had submitted to it briefs by both the State and the Defendant makes the following findings of fact and conclusions of law:

That Daniel Rodriquez was at all times relevant to this indictment acting as an agent for the Hidalgo County Sheriff and/or as an agent for other law enforcement agencies, and as such agent Daniel Rodriguez originated the alleged criminal plot in his own mind which was no more than an imaginary scheme created by said Rodriquez for the sole purpose of inducing and entraping the Defendant

into violating the law, and that such alleged violation of Article 15.03 of the Texas Penal Code by the Defendant would not have occurred except for such inducement;

The Court therefore finds as a matter of law that entrapment was established by the Defendant in violation of Article 8.06 of the Texas Penal Code and that all tape recordings and transcriptions thereof of conversations between Daniel Rodriquez and the Defendant were obtained in violation of said article, and that said tape recordings and transcriptions thereof as per the provisions of Article 38.23 of the Texas Code of Criminal Procedure should be suppressed.

It is therefore ORDERED, ADJUDGED AND DECREED by the Court that said tape recordings and transcriptions therefore shall be and they are hereby suppressed, and the Court directs that no evidential use of them shall be made against the Defendant on the trial of any criminal case.

DONE AND ENTERED this the 5th day of January, 1979.

/s/ Vernon D. Harville
Vernon D. Harville, Judge Presiding

APPENDIX "M"

(Filed October 10, 1979)

NO. C-2178-78-D

IN THE DISTRICT COURT
206TH JUDICIAL DISTRICT
HIDALGO COUNTY,TEXAS

THE STATE OF TEXAS

VS.

OSCAR B. McINNIS

DEFENDANT'S REQUESTED SPECIAL ISSUES

TO THE HONORABLE COURT:

The Defendant, Oscar B. McInnis, files this, his Requested Special Issues and Special Instructions, such request having been made and filed after both parties have closed and before the charge has been submitted to the jury for its consideration, and prior to the time that the parties have presented argument herein.

REQUESTED SPECIAL ISSUE NO. .....:

It is a defense to prosecution that a Defendant engages in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

In this section "law enforcement agent" includes personnel of the state and local law e. forcement agencies as

well as of the United States and any person acting in accordance with instructions from such agents.

In this connection, there has been introduced before you tape recordings allegedly made of conversations between the Defendant and Daniel Rodriguez on various dates in April and May, 1978. If you find that the Defendant engaged in the conversations indicated by the aforementioned tape recordings on the dates heretofore mentioned, then do you find that said Defendant engaged in such conversations because he was induced to do so by Daniel Rodriguez, a law enforcement agent, to-wit: Daniel Rodriguez, using persuasion or other means likely to cause persons to engage in such conversations?

You will answer this question "yes" or "no".

We the jury answer: ".....".

In connection with the foregoing issue, you are further instructed that unless you believe from a preponderance of the evidence that the Defendant was not induced to do so by a law enforcement agent as that term has been heretofore defined for you using persuasion or other means likely to cause persons to engage in such conversations, you will answer the said issue "yes".

You are further instructed that before you can answer the foregoing question "no" you must believe from a preponderance of the evidence that the Defendant, Oscar B. McInnis, was not induced to so by a law enforcement agent as that term has been defined heretofore for you, otherwise you will answer "yes".

The issues requested above are separately requested regardless of the burden of proof placed in the instruction. That is, the instruction is separately requested with the

burden reversed or placed upon the Defendant to prove the affirmative.

Respectfully submitted,

Oscar B. McInnis, Defendant
By: /s/ Jack Skaggs
Jack Skaggs
Of Counsel
Attorneys for Defendant

Denied—/s/ JBE

Opposition

Office - Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1792

In the Supreme Court of the Untied States

October Term, 1981

OSCAR B. McINNIS, *PETITIONER,*

vs.

THE DISTRICT GRIEVANCE COMMITTEE FOR DISTRICT 12-B OF THE STATE BAR OF TEXAS, ACTING IN THE NAME OF THE STATE OF TEXAS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS SITTING AT BEAUMONT

RESPONDENT'S BRIEF IN OPPOSITION

Jerry L. Zunker
(Counsel of Record)
General Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711
(512) 475-6202
Attorney for Respondent

TABLE OF CONTENTS

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Argument 3
Conclusion 9
Certificate 9

TABLE OF AUTHORITIES

Cases

Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) 6
Dotson v. State Board of Medical Examiners, 607 S.W.2d, 36 (Civ.App.—Ft. Worth 1980) rev'd other gds. 612 S.W.2d 921 (Tex 1981) 7
Edelman v. California, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953) 8
Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 1669 (1960) 6
Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972) 5
In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) 5
U.S. v. Kordel, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed2d 1 (1970) 4
U.S. v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed. 366 (1973) 7
Viator v. Stone, 336 U.S. 948, 69 S.Ct. 882, 93 L.Ed. 1104 (1949) 3
Wood v. Chesborough, 228 U.S. 672, 33 S.Ct. 706, 57 L.Ed. 1018 (1913) 3

STATUTES AND RULES

28 U.S.C. 1257 (3) 5
Tex. Penal Code Ann. Sec. 8.06 (Vernon 1974) 7, 8
Tex. R. Civ. P. 272 8

No. 81-1792

In the Supreme Court of the United States

OCTOBER TERM, 1981

OSCAR B. McINNIS, *PETITIONER,*

vs.

THE DISTRICT GRIEVANCE COMMITTEE FOR DISTRICT 12-B OF THE STATE BAR OF TEXAS, ACTING IN THE NAME OF THE STATE OF TEXAS, *RESPONDENT.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS SITTING AT BEAUMONT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the District Grievance Committee for District 12-B of the State Bar of Texas, files this its brief in opposition to the petition for writ of certiorari heretofore filed herein by Oscar B. McInnis, Petitioner, respectfully praying that such petition be denied for the reasons and upon the grounds hereinafter stated.

OPINIONS BELOW

The judgment of the trial court, the 206th District Court of Hidalgo County, Texas, is unreported but is correctly set forth in the appendix to the petition at page A1. The opinion of the Court of Appeals for the Ninth Supreme Judicial District of Texas is reported in 618 S.W.2d 389 and a correct copy thereof appears at page A4 in the appendix to the petition. The denial of the application for writ of error to the Supreme Court of Texas, the denial of the motion for rehearing by the Supreme Court of Texas and the order granting motion to stay enforcement of the judgment are all unreported, but correct copies thereof appear at pages A21 and A22, respectively in the appendix to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

As set out by Petitioner, the questions presented to this court are as follows:

I. Whether the Court of Appeals erred in ruling that the trial court did not err in overruling Petitioner's motion for a continuance at a time when he was under indictment for perjury based on the same fact situation as the civil case.

II. Whether the Court of Appeals erred in holding that it was permissable for Respondent to call Petitioner as an adverse witness, over his protest, thereby forcing him to invoke his privilege against self-incrimination in the presence of the jury.

III. Whether the taped conversations which had been excluded in a state criminal prosecution based on the same fact situation on the grounds that they had been obtained through entrapment could thereafter be used by another arm of the state (The State Bar of Texas) for use in this disbarment proceeding.

IV. Whether the State statutory defense of entrapment was available to Petitioner.

V. Whether the Court of Appeals erred in holding that the conduct of law enforcement agents was not so outrageous as to bar the admission of such tapes in evidence, based on the conclusion that this is a civil proceeding.

VI. Whether the standard of proof in this disbarment case is by "a preponderance of the evidence" or the "clear and convincing" standard.

ARGUMENT

The petition presents nothing for this Court to review. It is entirely frivolous and, rhetoric aside, presents no questions warranting review on certiorari. Apart from the fact that the questions posed are so inartfully stated as to generally obscure any federal ground, even those that may have some relation to this case, it is obvious, both from the petition and from the opinion of the Court of Appeals, that all the questions were decided, and the judgment below based, upon nonfederal grounds. It has long been the rule that the Supreme Court will decline to exercise its jurisdiction when the judgment of the state court is based on a nonfederal ground adequate to support it. *Viator v. Stone,* 336 U.S. 948, 69 S.Ct. 882, 93 L.Ed 1104 (1949). This is true even though the federal question was properly presented to the state court. *Wood v. Chesborough,* 228 U.S. 672, 33 S.Ct. 706, 57 L.Ed. 1018 (1913).

I.

Petitioner overstates his dilemma when he asserts he was compelled to choose between his privilege against self-incrimination and his right to due process. There is nothing inherently contrary to the requirements of due process in requiring the Petitioner in this disciplinary trial to be put to an election – to testify or to remain silent in front of the jury. The only consequence of his silence was the possibility that an unfavorable inference might be drawn by the trier of fact. He was not subjected to any automatic penalty or judgment simply because he refused to testify. Petitioner's argument that just because he had something to lose by the choice, he ought not be compelled to make it, is answered by *U.S. v. Kordel,* 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed2d 1 (1970).

Petitioner, it must be emphasized, was allowed to claim his privilege against self-incrimination. He was not compelled to testify. He was required to take the witness stand but he was permitted to assert the privilege in response to specific questions. His decision to testify or not was the result of trial strategy, not compulsion. He chose not to testify but he could have elected otherwise. The privilege against self-incrimination merely preserves the choice. It does not guarantee the choice will be easy or one without consequences.

The granting of a continuance lies within the sound discretion of the trial court and the Court of Appeals found no abuse of that discretion. As the Court of Appeals observed, public protection from lawyers guilty of misconduct demands that such suits not be subjected to "long and indefinite delay." This issue was decided upon a nonfederal basis and follows a consistent line of Texas cases. In electing to remain silent, Petitioner was not denied the right to defend himself and no consitutionally prohibited consequences or penalty accrued to him simply as a result of his choice to exercise his privilege to remain silent.

II.

Contrary to petitioner's assertion that the Court of Appeals decided the federal question in a way which conflicts with the decisions of this Court and with decisions of the federal courts of appeal, the respondent would point out that there is no "federal question" involved in Petitioner's second question for review. Further, Respondent would show that the Petitioner's stated basis for review are not one of those grounds set out in 28 U.S.C. 1257 (3). Petitioner never explains, apparently for the obvious reason that he cannot, why a question involving the label to be applied to an attorney disciplinary proceeding, without more, raises such an inquiry to the level of a "federal question." The holding of this Court in *In Re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed2d 117 (1968), upon which the Petitioner relies, is not authority for his position. That case merely held that an attorney in a disciplinary proceeding was entitled to minimum procedural due process requiring notice and an opportunity to be heard. There is nothing in that case to suggest that the label applied to such proceeding, whether "civil," "criminal" or "quasi-criminal," had its roots in federal law. Furthermore, neither *In Re Ruffalo,* supra, or *Erdmann v. Stevens,* 458 F.2d 1205 (2d Cir. 1972), also cited by Petitioner, involved the application of the privilege against self-incrimination.

The holding of the Court of Appeals that in Texas attorney disciplinary proceedings are civil in nature follows not only an express rule promulgated by the Supreme Court of Texas (section 21, of the Rules Governing The State Bar of Texas), but a consistent pattern of Texas decisions (appendix to petition, p. A6 and A7) so holding. There can be little basis then for the Petitioner to argue, as he does by implication, that the Court of Appeals decided the question on a non-federal basis simply to evade the federal constitutional issue. This Court has held that a

prison disciplinary proceeding is a civil proceeding and that the privilege against self-incrimination does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. *Baxter v. Palmigiano,* 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). The same principles ought to apply to attorney disciplinary proceedings.

Petitioner misleads this Court by implying that the Respondent improperly commented to the jury and urged it to draw inferences of guilt from Petitioner's assertion of the privilege against self-incrimination. Petitioner says this made the assertion of the privilege "costly." In truth and in fact, Respondent's counsel commented to the jury about Petitioner's assertion of the privilege only after Petitioner's counsel had challenged Respondent's counsel to comment, and had in fact invited him to do so. (SF 2891).

III.

Petitioner's third point is even more obtuse than his other points. He mingles without distinction theories of estoppel and the exclusionary rule. Furthermore, Petitioner reveals his total lack of understanding of the "silver platter" doctrine by insisting that the appeals court should have followed its principles. Had the "silver platter" doctrine been applied by the appeals court, as Petitioner urges, the evidence he objects to would have been admitted. The "silver platter" doctrine permitted the admission in federal criminal trials of evidence obtained by state officers as a result of an unreasonable search. In the case cited by Petitioner, (*Elkins v. United States,* 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 1669 (1960)), the Supreme Court rejected the "silver platter" doctrine and held that evidence obtained illegally by state officers could not be introduced against a defendant in a federal criminal trial over his objection.

Even though Petitioner under this point tries to fashion a denial of some sort of a federal right, what he is really talking about is some sort of bar or estoppel principle which would prevent the use of the tapes by the State Bar in the disciplinary case when such tapes had been suppressed in a state criminal trial pretrial motion. Even if there was any sort of legal theory that would prevent the use of the tapes in the second trial, such principle would be a matter of state law. Certainly, it could not be a matter arising under the Constitution of the United States. It is no wonder that the Petitioner has difficulty articulating this point, and it comes as no surprise to see that he cannot cite to any case nor to any portion of the Constitution or its amendments for support of it.

IV.

Petitioner's fourth point is based on the defense of entrapment and was obviously decided by the Court of Appeals on state and not federal grounds. The Court of Appeals properly decided that Tex. Penal Code Ann. Sec. 8.06 (Vernon 1974) by its terms had no application to the disciplinary proceeding. In a Texas medical disciplinary proceeding, the same contention was made and overruled by another Texas Court of Appeals. The case was reversed on other grounds by the Supreme Court of Texas but that court, at least by implication, found no error in the opinion of the Court of Appeals which held that the defense of entrapment was limited to criminal prosecutions. *Dotson v. State Board of Medical Examiners,* 607 S.W.2d 36 (Civ.App.—Ft. Worth 1980) rev'd other gds. 612 S.W.2d 921 (Tex 1981).

Entrapment, as a defense, does not rest on constitutional grounds. *U.S. v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed. 366 (193). The infiltration of a criminal enterprise by a government agency violates no constitu-

tional right of those participating in the criminal activity. The dimensions of the entrapment defense in a state proceeding are thus measured by local law. That is, Tex. Penal Code Ann. Sec. 8.06 (Vernon 1974). Petitioner contends that the tapes were "illegally obtained evidence" because he was entrapped. The Court of Appeals, following announced state law, however held, in effect, that the tapes were not "illegally obtained" since Section 8.06 had no application to the disciplinary proceeding. Petitioner's cited cases which hold "illegally obtained evidence" may not be used in quasi-criminal proceedings, thus have no application and need not be discussed.

V.

Again, Petitioner's fifth question was decided on nonfederal grounds. The Court of Appeals held that the "outrageous conduct of law enforcement agents" defense was irrelevant to this disciplinary proceeding since such a defense has only been applied to criminal cases. The disciplinary proceeding was not a criminal proceeding. The Court of Appeals, upon review of the record, further found no such outrageous actions as to render the evidence inadmissible even if the defense had been available.

VI.

The Court of Appeals pointed out that contrary to the procedural requirements of Tex.R.Civ.P. 272, Petitioner failed to object to the trial court's charge to the jury concerning the standard of proof. In the absence of an objection, the Court of Appeals held that Petitioner waived such complaint. A long list of Texas cases were cited as support for such holding. Non-compliance with state procedural requirements has been held to be adequate nonfederal grounds. *Edelman v. California,* 344 U.S. 357, 73

S.Ct. 293, 97 L.Ed. 387 (1953). Hence, Petitioner's sixth point presents nothing for review by this court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari filed by Petitioner, Oscar B. McInnis, should be denied.

Respectfully submitted,

Jerry L. Zunker
(Counsel of Record)

P.O. Box 12487
Capitol Station
Austin, Texas 78711
(512) 475-6202

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Jerry L. Zunker, a member of the Bar of the Supreme Court of the United States, do hereby certify that three (3) copies of the foregoing Respondent's Brief in Opposition have been served on Petitioner by depositing same in a United States Post Office with first class postage prepaid, addressed to John Lewis, P.O. Drawer 2285, McAllen, Texas 78501, counsel of record for Petitioner, on this the 23rd day of April, 1982.

Jerry L. Zunker